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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the Establishment Clause requires the denial of equal access to a small, voluntary, student-initiated and student-led group wishing to meet for religious speech in a limited open forum created by a public high school.

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, the petitioners herein and appellees in the court of appeals below are Petros, an unincorporated association, and the parents acting on behalf of the following students*: Michael Bender, Denise and Michelle Marshall, Julie Hobart, Jeffrey Fredrof, Brian Foelsch, Julie, Heidi, and Kim Ulmer, Shawn Seevers, Peter Strayer, and Bruce Brossman. Mr. John C. Youngman, Jr., then a member of the Williamsport Area School Board, was a defendant in the district court and the appellant below. Williamsport Area School District was a defendant in the district court. Although it did not take a formal role in the court of appeals proceedings, the Williamsport Area School District has treated Mr. Youngman's appeal as its own throughout these proceedings. *See* n.7, *infra*.

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* Students involved have graduated at different stages of the litigation and the court of appeals granted the students' motion to add additonal plaintiffs. App. A at 4a n.4. As a result, the name of Michael Bender has been substituted for that of Lisa Bender, who has graduated from Williamsport Area High School. Denise Marshall, Julie Ulmer, Shawn Seevers, Peter Strayer, and Bruce Brossman graduated during the court of appeals proceedings.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Michael Bender, et al., Williamsport Area High School students, who are members of Petros, an unincorporated association (hereinafter, collectively, "the students" or "Petros"), respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) is reported at 741 F.2d 538. The opinion of the District Court (App. C, *infra*) is reported at 563 F. Supp. 697.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1984. The court's order denying rehearing and suggestion of rehearing *en banc* (App. B, *infra*), was entered on August 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Equal Access Act, Title VIII of Public Law 98-377, enacted on August 11, 1984, is reprinted at Appendix E, *infra*.

STATEMENT OF THE CASE

A. The Facts

Williamsport Area High School ("Williamsport High") is a 2500-student secondary school which serves students in grades 9 through 12. J.A. 238.[1] Williamsport High draws students from about a 100 square mile area and is located on a 147-acre campus, more than a mile from the nearest residence. J.A. 239, 248-249. Consequently, the vast majority of the students arrive and leave the school by bus. J.A. 246. Students are to be in their homerooms at 7:45 AM for twelve minutes during which attendance is taken and announcements made. J.A. 365.

On Tuesday and Thursday mornings, the school has an extracurricular activity period which runs from 7:57 AM to 8:27 AM, immediately following homeroom. J.A. 245-46, 368. The purpose of the activity period is to accommodate those student activities that contribute "to the intellectual, physical, or social development of the students and is otherwise considered legal and constitution-

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[1] Citations to the record as reprinted in the joint appendix submitted to the court of appeals will be denoted as "J.A.". Citations to materials in the separate appendix accompanying this petition will be denoted as "App.".

ally proper." App. A at 9a, quoting affidavit of Principal Wayne Newton. It is "a time during the day in which students can take care of all extracurricular activities." J.A. 245 (Dep. of Principal Wayne Newton). On Tuesdays and Thursdays, classroom instruction does not begin until 8:31 AM. J.A. 245-46, 368.

During the activity period, students may choose to participate in any one of more than 25 activities, ranging from academic interests to recreational and social pursuits.[2] Students also have the option of remaining in their homerooms, studying in the library, or visiting the computer station to receive career guidance and college preparation. App. A at 7-8a. Attendance at any of the activities is left to the individual student and is completely voluntary. App. A at 8a, 18-20a. The activity period is not tied to the formal curriculum of the school. App. A at 19a.

In September, 1981, three students, Lisa Bender, Morris Braggs, and Kerry Hunter, all seniors, asked Mr. Wayne Newton, the school principal, for permission for themselves and other interested students to meet during the activity period for Scripture reading, discussion, and prayer. Mr. Newton initially granted their request, but advised them that they could not use the public address system or bulletin boards to publicize the meeting. App. A at 6a.

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[2] Student clubs which are currently active include: Student Government; Peer Helpers; Key Club; Class organizations; Business English Club; Future Homemakers of America; Vocational-technical Club; Spanish Club; Ecology Club; Speech and Drama Club; Office Aides; Band; Choir; Student Newspaper; Student Literary Art Magazine; and a Student Yearbook.

Other clubs which have been approved in the past and might be renewed if interest warranted are: Archery; Art, Audubon; Aviation; Bowling; Chemistry; Chess; Field, Forest and Stream; Future Nurses; Future Teachers; German; Poetry; Photography; and Ski Club. App. A at 8a n.8.

BEST AVAILABLE COPY

Forty-five students, or less than 2 percent of the student body, attended the first meeting of this group, later to be called "Petros". *Id.* A teacher opened the room, took attendance, and remained in the room grading papers, but took no part in the meeting. App. A at 9-10a. The students read a few Bible verses without comment, and some students shared concerns for which they wanted prayer, and a few students prayed. J.A. 402. The school did not receive any complaints from anyone about the meeting. J.A. 256.

At the second meeting of the group, Morris Braggs told the 20 students in attendance that Mr. Newton had decided Petros could not meet until he had obtained approval from the superintendent of schools and the school's attorney. Mr. Newton expressed concern to the students over the constitutionality of the meeting. J.A. 254. After a short prayer, the students immediately disbanded and returned to their homerooms. J.A. 402.

On October 1, 1981, the students wrote a letter to the school district superintendent expressing their disappointment at being barred from meeting. J.A. 228, 230. In response, the superintendent told them it would be "legally improper for a School District to approve or endorse such an activity on school district premises or on school time." J.A. 84 (letter of Superintendent Oscar Knade to Morris Braggs). He told them that they could not meet until the school's attorney had issued a written opinion on the matter. He asked the students to provide him with information about the proposed activity including information about faculty role, meeting times, and likely membership. *Id.* The students provided the superintendent with the requested information on October 23, 1981.[3]

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[3] The student proposal submitted at the superintendent's request reads as follows:

The following week, the school's attorney issued a written opinion which concluded that for the school to permit Petros to meet would violate the First Amendment. J.A. 80. On November 16, 1981, the school principal and the superintendent met with six Petros student representatives to explain the constitutional reasons for banning their meeting. J.A. 80-81. The students were not per-

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NAME OF THE ORGANIZATION

[Petros] (The Rock)

THE NATURE OF THE ORGANIZATION

The organization will be a non-denominational prayer fellowship. Participation will be voluntary and open to all students.

PURPOSE OF THE ORGANIZATION

The purpose of the organization will be to promote spiritual growth and positive attitudes in the lives of its members.

LEADERSHIP

Selection of leaders will be by democratic election. The leaders will be responsible for directing the meetings and coordinating activities in a manner that will carry out the purpose of the organization.

MEETINGS

Regular meetings of the organization will be held on school premises during the Tuesday and Thursday morning activity periods. They will include Scripture reading, discussion, prayer and other activities which may be of interest to the group.

SUPERVISION

Meetings of the organization will be supervised by a faculty advisor. Student attendance may be verified by the signing of a roster.

App. A at 5-6a. There is no formal mechanism or procedure for applying to be allowed to meet during the activity period, other than oral and possibly written request as was done by the students. *Id.* at 8a n.8.

mitted to meet before or after school on campus. J.A. 254, 288.[4]

The students appealed to the school board. J.A. 234. On January 19, 1982, the school board approved the ban, again on advice of counsel. J.A. 89. Two days later, the president of the board sent the students a letter denying their appeal, stating as the basis for the denial:

> The solicitor [has] advised the Board that to approve your proposal would be a violation of existing case law and therefore, an improper action. The Board decided, therefore, to deny your appeal.
>
> Please be assured that neither the School Board, nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.

App. A at 6a.

According to Mr. Wayne Newton, the school principal since 1974, no group of students had ever been denied permission to meet during the activity period, except the students before this Court. App. A at 8a. The decision banning the petitioners' meetings was made *solely* on the advice of the school district attorney that such a meeting would violate the Establishment Clause of the United States Constitution. App. A at 21a. J.A. 89.

There is no evidence that the school district has ever initiated or promoted a religious activity in the past. J.A. 258. In the past, the school has offered elective courses in "Literature of Western Religions", although it was not offered in 1981-82. J.A. 271.

On June 3, 1982, ten student members of Petros and their parents brought suit against the school district,

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[4] An off-campus "released time" option was discussed. This was an empty offer, however, in view of the 30-minute time allowed for the activity period and the school's isolated location (over one mile from the nearest residence), coupled with the fact that the vast majority of the students are bussed and, therefore, have no independent transportation. J.A. 246, 248, 249.

its administrators and the school board members in the United States District Court for the Middle District of Pennsylvania. The complaint alleged that denying them permission to meet violated their freedom of speech, free exercise of religion, freedom of association, and equal protection rights. Defendants' answer substantially admitted the facts in the complaint and relied on the Establishment Clause as their defense to the students' claims.

B. The Decision of the District Court

After discovery, the parties filed cross motions for summary judgment. Chief District Judge William Nealon granted summary judgment to the students on their free speech claim and granted summary judgment to the school board on the free exercise of religion claim. In holding for the students, the Court relied on *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and held that the school had denied the students the right to meet during the activity period, a limited open forum for students' speech, solely because their speech was religious. App. C at 102a.

The district court held that "*under the precise set of undisputed facts presented*", accommodating the students' speech would not violate the Establishment Clause. *Id.* (emphasis in original). Therefore, the school district had not demonstrated a compelling state interest to justify abridgement of the students' freedom of speech.

The district court held that the limited open forum had a self-evident secular purpose. *Id.* at 88a. Second, the primary effect of equal access would be the accommodation, not the advancement, of religion, given the "broad spectrum of student groups" meeting, as in *Widmar*. *Id.* at 90a. The district court found that high school students are mature enough to appreciate the neutrality of equal access, particularly absent the coercion which had existed in the "traditional school prayer cases." *Id.* at 97a. Third, no excessive entanglement was found "[i]nasmuch as the teacher would be present only to ensure orderly meetings" and "would be the functional equivalent of a policeman at a religious rally held in a public park." *Id.* at 99-100a.

Following the district court decision, the students met during the activity period for the 1983-84 school year. In letters exchanged between the attorneys for the students and the school district, the meetings were described as being student-initiated, student-led and orderly. App. D at 107a.[5] Members of the group discussed peer problems, school problems and home problems; some read Scripture and prayed. *Id.* A teacher sat at a table in a different part of the room from the students, graded papers and prepared lesson plans. *Id.* The meetings were held in a section of the cafeteria away from all other classrooms and students. *Id.* No students at the school believed that the meetings were "school-sponsored", and there was no divisiveness stemming from the meetings. *Id.*[6]

C. The Decision of the Court of Appeals

Defendant John Youngman appealed the district court's ruling on the students' free speech rights to the U.S. Court of Appeals for the Third Circuit.[7] On July 24,

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[5] The subsequent conduct of the meetings in 1983-84 is not part of the record in the proceedings below. However, the continued accuracy of the factual findings of the district court regarding the nature of the meetings in 1981 were not disputed by the court of appeals and can be accepted by this Court.

[6] *See also*, Taylor, *Student Prayer Group Sues for Right to Meet*, The New York Times, August 7, 1984, at 8 ("But at the Williamsport high school, by all accounts there has been no hint of pressure for students to join Petros, which has both supporters and opponents in the Williamsport community, and nothing resembling official endorsement of religious activity.").

[7] The school board members were sued both in their official and individual capacities. After the parties filed their briefs on the merits in the court of appeals, Mr. Youngman's tenure on the school board ended. A petition for attorneys' fees under 42 U.S.C. 1988 is pending before the district court against Mr. Youngman and the other defendants. *Cf., e.g., Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 347 n.6 (1979).

Furthermore, Williamsport Area School District has continuously treated Mr. Youngman's appeal as its own. On October 10, 1984,

1984, a divided panel of the Third Circuit reversed the district court holding on the basis of the Establishment Clause. It agreed with the district court's holding that, under *Widmar*, the defendants had violated the students' free speech right by excluding them from a limited public forum solely on the basis of the religious content of their speech. App. A at 20-21a.

However, the panel majority held that the Establishment Clause would be violated by allowing the students to meet. Although it agreed that the secular purpose of the forum was "manifest", *id.* at 2-3, it held that accommodating the students' religious speech would have the primary effect of advancing religion and result in excessive entanglement. *Id.* at 32a, 35a.

The Third Circuit rejected the Establishment Clause analysis in *Widmar* as inapplicable to high school students. Having held that both the Free Speech Clause and Establishment Clause were violated, the panel believed it faced "a constitutional conflict of the highest order . . . . with no definitive guidance from the Court as to the proper direction to take." *Id.* at 36a. It held that the Establishment Clause outweighed the students' free speech rights. *Id.* at 41a.

Judge Adams dissented, on the grounds that the majority opinion is inconsistent with *Widmar* v. *Vincent.*

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the school district denied the students permission to meet for religious speech because of the Third Circuit decision. *See* App. D. In addition, on September 1, 1983, the school district entered a brief in opposition to the students' petition for attorneys' fees in excess of $20,000, under 42 U.S.C. 1988, on the grounds that the district court decision was on appeal to the Third Circuit and, if the decision were reversed, the students would not be the prevailing party. On December 14, 1983, the district court ordered the fee petition held in abeyance pending the outcome of the appeal. On August 29, 1984, the school district moved for dismissal of the students' petition for attorneys' fees before the district court, on the grounds that students were no longer the prevailing party in the district court after the court of appeals decision.

Specifically, Judge Adams wrote that the majority's "bright line rule—no prayer in public secondary schools" is a "wooden reading of the First Amendment" and "at variance with controlling precedent." *Id.* at 45-46a. Having refuted the majority's distinctions between *Widmar* and Williamsport, Judge Adams suggested that the majority's concern "stems not from the prospect of establishment of religion by the presence on the campus of Petros, but from the possibility of unconstitutional extensions of the Williamsport arrangement elsewhere", which "can be dealt with as they arise." *Id.* at 61a.

On August 15, 1984, with two judges dissenting, the Third Circuit denied the students' petition for rehearing and request for rehearing en banc. On August 28, 1944, the Third Circuit issued a stay of mandate until November 13, 1984, pending the filing of the petition for a writ of certiorari.

On September 20, 1984, the school turned down the students' request for permission to meet during the activity period for the 1984-85 school year on the same basis as the students had met the year before. On October 10, 1984, the school board again denied the students' request to meet. App. D.

On July 25, 1984, the United States House of Representatives passed the Equal Access Act by a vote of 337-77, which had passed the Senate on June 27, 1984, by a vote of 88-11. Title VIII of Public Law 98-377. On August 11, 1984, President Reagan signed the Act into law, thereby prohibiting a public secondary school which has a limited open forum from denying equal access to students who wish to meet for "religious, political, philosophical, or other speech".[8]

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[8] An ad hoc committee has formulated guidelines to school administrators for administration of the Act. 130 *Cong. Rec.* H12270 (daily ed. October 11, 1984) (statements of Rep. Bonker and Rep. Goodling). The ad hoc committee consists of the following groups: Christian Legal Society, American Civil Liberties Union, National

REASONS FOR GRANTING THE WRIT

Williamsport Area School District believes the Constitution prohibits any accommodation of student-initiated and student-led religious speech on campus. Therefore, it has singled out the students before this Court for unique exclusion from an expressive forum created by the school, solely because their speech is religious.

The analysis of this Court in *Widmar* prohibits such a prior restraint on extracurricular religious speech by high school students. Nor have the Establishment Clause decisions of this Court required the prohibition of *self*-initiated, rather than *state*-initiated, religious activity. The Establishment Clause is a restraint on religious speech by the state and its agents, not on religious speech by private individuals with their peers.

By holding unconstitutional the accommodation of high school students' religious speech on an equal access basis, the Third Circuit has propounded a peculiar constitutional paradox. According to the Third Circuit, the Constitution *requires* public high schools to discriminate against religious speech, even though it *forbids* public universities from doing so. This result is inherently implausible.

School administrators across the country share the confusion of the Williamsport school officials as to the constitutionality of equal access for high school students. The federal courts and school administrators need the guidance of this Court to resolve the confusion created by the conflict: 1) between *Widmar* and lower court decisions, such as this one, prohibiting equal access; 2) between lower court decisions prohibiting equal access and those indicating that some form of equal access is permissible; and 3) between the lower court decisions prohibiting equal access and the Equal Access Act, in which

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Association of Evangelicals, Baptist Joint Committee on Public Affairs, Americans for Democratic Action, National Education Association, American Association of School Administrators.

Congress recognized the application of *Widmar* to public secondary schools.

I. The decision of the Court of Appeals, denying equal access for a small, voluntary, student-initiated and student-led group wishing to meet for religious speech in a limited open forum created by a public high school for student expression, conflicts with this Court's decision in *Widmar* v. *Vincent*.

The decision of the Third Circuit prohibiting equal access for these students cannot be satisfactorily reconciled with this Court's decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). In *Widmar*, this Court held that a public university violated the Free Speech Clause by excluding religious speech from a limited public forum it had created for student meetings. This Court rejected the argument that the Establishment Clause compelled a content-based discrimination against religious speech. Although this Court did not explicitly extend its holding to secondary school students, neither did it limit its holding to college students, noting only that "[university students] are less impressionable than younger students." 454 U.S. at 274 n.14. *See, Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 506 (1969) (secondary school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

The district court below held that *Widmar* required, on the specific facts in this case, that the students be granted equal access. App. C at 84a, 101a. Although the court of appeals relied on *Widmar* to find that the students' freedom of speech had been restricted, the appellate court rejected the Establishment Clause analysis of *Widmar*, justifying its departure from *Widmar* upon certain differences between a college and a high school. App. A at 15-16a, 25a. As Judge Adams explained in his dissent, however, the majority's distinctions are "not persuasive" and its result is "at variance with controlling precedent," *i.e.*, *Widmar*. App. A at 46-48a, 54a.

A. The students' right of equal access for religious speech in this case is identical to the free speech right protected in *Widmar*.

In their holdings that the students' free speech rights had been abridged by the denial of equal access, both the Third Circuit and the district court relied heavily on *Widmar*. App. A at 14-17; App. C at 84a, 101a.[9] The courts below agreed that, as in *Widmar*, Williamsport High School had created a limited open forum for student expression and that the students' religious speech fell within the scope of the forum as defined by the school officials. App. A at 19-21a; App. C at 81a, 84a. The courts also agreed that, as in *Widmar*, the students had been denied permission to meet solely because the content of their speech was religious, thus becoming the only group denied access to the activity period in the history of the school. App. A at 8-9a, 21a; App. C at 84a.

B. The decision below, that equal access for these students' religious speech violates the Establishment Clause, conflicts with *Widmar*.

In holding that the accommodation of the students' religious speech would have a primary effect of advancing religion and create an excessive entanglement between the state and religion, the Third Circuit rejected the Establishment Clause analysis of *Widmar*. In *Widmar*, this Court held that equal access would not have a pri-

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[9] The courts below also relied on this Court's decisions in *Tinker* and *Healy* v. *James*, 408 U.S. 196 (1972) (student group cannot be denied recognition by state university based on content of their speech). *See also*, Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983); Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 Geo. L.J. 135 (1983); Loewy, *School Prayer, Neutrality, and the Open Forum: Why We Don't Need A Constitutional Amendment*, 61 N.C.L. Rev. 141 (1982); Note, *Widmar v. Vincent and the Public Forum Doctrine: Time to Reconsider Public School Prayer*, 1984 Wis. L. Rev. 147 (1984).

mary effect of advancing religion because the forum in that case was available to a broad class of nonreligious as well as religious groups. *Widmar*, 454 U.S. at 274; *see also*, *Mueller* v. *Allen*, 103 S. Ct. 3062, 3068 (1983) (state benefit of tuition tax deductions allowed to all parents has secular primary effect). This Court also held that a neutral policy of equal access would not create an excessive entanglement. *Widmar*, 454 U.S. at 272 n.10 (exclusion of religious speech creates greater risk of excessive entanglement).

The district court, in applying *Widmar* to the specific facts of this case, held that the Establishment Clause would not be violated, since the school could not reasonably be perceived to be promoting Petros. The students were free to choose among a broad range of student activities during the activity period. Moreover, Petros was student-initiated and student-led with no school employee participating in the content of the meeting. App. C at 88-99a; *accord*, App. A at 52-53a, 55a, 61a (Adams, J., dissenting).

Although the Third Circuit panel repeatedly emphasized the complete voluntariness of the students' decisions to participate in any of a broad range of activities, and repeatedly recognized the neutrality of school officials in the students' selection of activities, *id.* at 8a, 18-20a, the panel rejected the applicability of the *Widmar* Establishment Clause analysis solely because the facts in *Widmar* involved a college rather than a high school. *Id.* at 25a.

Instead, the panel majority adopted a *per se* rule which "essentially rests on the view that collective religious speech simply may not take place within the walls of a public secondary school without violating the Constitution." *Id.* at 45a (Adams, J., dissenting); *id.* at 43a n.30. The panel majority relied on various factors by which it distinguished *Widmar* and constructed an Establishment Clause violation. However, "the predicted

effect of these institutional differences [between *Widmar* and Williamsport] represents uncorroborated speculation without any basis in the record." App. A at 56a (Adams, J., dissenting).

1. *Compulsory attendance laws.* The panel majority held, in effect, that compulsory attendance laws transform all extracurricular student meetings into coercive activities. To the contrary, as the panel majority itself repeatedly emphasized, the student religious group in this case exists only if individual students, acting completely in their own discretion, decide to form a group. App. A at 8a, 18-20a. The students' private choice to meet in a limited public forum does not create any reasonable inference of state advancement, let alone coercion. *Id.* at 55a (Adams, J., dissenting) (noting that many students are over seventeen, the compulsory age limit). *See, Mueller* v. *Allen*, 103 S. Ct. at 3069 (when a state benefit is available only as the result of decisions of individuals "no imprimatur of state approval can be deemed to have been conferred on any particular religion, or on religion generally"), *citing Widmar*, 454 U.S. at 274. The panel majority erred in failing to follow this *Widmar* principle.

2. *The nonparticipatory presence of an adult monitor.* The panel majority also held that the Williamsport students would perceive the nonparticipatory presence of an adult monitor as state approval of religion. Again, this holding is unsupported by any evidence in the record. The panel majority admitted that the monitor in this case took no part in the meeting whatsoever but merely graded papers in the back of the room. App. A at 10a. The students clearly did not perceive the monitor as giving an imprimatur of state approval to their activity. Furthermore, the students had offered to forego any monitor whatsoever. App. C at 99-100a; App. A at 55-56a (Adams, J., dissenting) ("The majority's concern . . . is similarly not justified by the record.").

3. *Location of the forum.* The panel held that the students' meeting on school premises would create the perception of school approval of the content of the students' speech, relying on *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). However, the panel majority erred in its disregard for the controlling factual distinctions, which it recognized existed, between *McCollum* and the self-initiated, extracurricular religious activity in the present case. App. A at 28a. It thereby rejected the clear indication in *Widmar* that *McCollum* was not an equal access case. *Widmar*, 454 U.S. at 27 n.10 (in *McCollum*, the Court had "invalidated statutes permitting school facilities to be used for instruction by religious groups, but not by others.") (emphasis in original); App. A at 57-58a (Adams, J., dissenting).

4. *The ability of high school students to distinguish state advancement from state neutrality.* The panel majority held, as a matter of law, that high school students are too immature to understand that equal access for student-initiated religious speech reflects government neutrality toward religion. However, the panel majority's holding is inconsistent with Supreme Court and numerous lower court decisions recognizing that students are sufficiently mature to engage in a protest of war, to refuse to salute the flag based on religious objections, and to understand that the study of the Bible as history or literature in public school courses does not imply state approval of religion. *See, respectively, Tinker*, 393 U.S. 503 (1969); *West Virginia Board of Education* v. *Barnette*, 311 U.S. 624 (1943); *Abington*, 374 U.S. at 225 (1963).[10] Likewise, this Court has recognized that the

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[10] *Id.* at 51a (Adams, J., dissenting), citing numerous federal court decisions recognizing high school students' ability to hear controversial views without perceiving school endorsement. *See*, Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-509 (1983) (survey of recent studies of adolescent psychology demonstrating sophisticated cognitive capacity of adolescents by age 14-15); *see*

accommodation of released time programs for religious instruction during the school day does not signal to students state approval of religion. *Zorach* v. *Clauson*, 343 U.S. 306 (1952).

The court of appeals opinion is likely to prove to be a self-fulfilling prophecy where one is dealing with the question of perception. With respect to constitutional rights, public perception is molded by the courts. Nothing in reason says that equal access for all groups is preferential treatment of one, but judicial decisions, such as the one below, will reinforce a misperception, if it indeed exists, rather than correct it.

5. *Divisiveness.* The panel majority also held that allowing Petros to meet would create political divisiveness in Williamsport Area High School, thereby, violating the excessive entanglement prong. However, this Court recently held that no inquiry into potential divisiveness is called for in a case that does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions. *Lynch* v. *Donnelly*, 104 S. Ct. at 1364-65, *citing Mueller*, 103 S. Ct. at 3071 n.11; App. A at 60a n.11 (Adams, J., dissenting).[11]

Thus, in holding that the Establishment Clause was violated, the majority ignored: 1) the specific factual findings of the district court to the contrary; 2) the guidance of this Court in *Widmar*; 3) case law and legal literature as to the maturity of high school students; and 4) the record itself. Contrary to *Widmar*, the panel majority effectively placed the burden on the students to demonstrate that the Establishment Clause would not be

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also, e.g., Bellotti v. *Baird*, 443 U.S. 622 (1979) (minor generally is sufficiently mature to obtain abortion without parental or court consent); *cf.*, U.S. Const. Amend. XXVI (high school students who are eighteen years old have the right to vote).

[11] *The New York Times, supra* n.6 (no divisiveness found in Williamsport).

violated, rather than on the state to demonstrate that it would be violated. *See, id.* at 55a (Adams, J., dissenting).

C. The failure to follow *Widmar* needlessly created a conflict between the Free Speech Clause and the Establishment Clause.

By its failure to follow the *Widmar* Establishment Clause analysis, the panel majority created an unnecessary conflict between the Free Speech Clause and the Establishment Clause. *See, Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1359 (1984) (failure to follow First Amendment's affirmative mandate of accommodation results in "callous indifference" by the state and an unnecessary war between the Establishment Clause and other First Amendment protections).[12]

Believing it faced "a constitutional conflict of the highest order" and a question of first impression, the panel majority specifically held, contrary to *Widmar*, that speculative Establishment Clause concerns outweighed the students' freedom of speech. App. A at 41-43a. To the contrary, however, the unique exclusion of a religious student group itself raises a potential Establishment Clause violation, since governmental action evincing hostility toward religion is equally prohibited. App. A at 53-54a (Adams, J., dissenting); *Lubbock Civil Liberties Union* v. *Lubbock Independent School Dist.*, 680 F.2d

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[12] After finding the Establishment Clause to be a compelling state interest, the panel majority violated traditional free speech analysis by failing to consider less restrictive alternatives to a prior restraint on the students' speech. *See, e.g., Widmar*, 454 U.S. at 270. Such alternatives suggested below by the students include: 1) a disclaimer posted on the door of the room where the students meet, to the effect that the school does not approve or disapprove of the meeting being held there (*see Widmar*, 454 U.S. at 274 n.14 (university disclaimer made reasonable inference of state support less likely)); 2) a non-teacher monitor (App. A at 56a) (Adams, J., dissenting); 3) meeting in rooms other than classrooms, as the students did in this case (*id.*); and 4) foregoing use of the school media, as the students did in this case (*id.* at 59a).

424 (5th Cir. 1982) (Reavley, J., dissenting from denial of rehearing en banc); *see*, *Lynch*, 104 S. Ct. at 1368 (O'Connor, J., concurring). *See also*, *McDaniel* v. *Paty*, 435 U.S. at 617, 640-42 (Brennan, J., concurring) ("The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.")

D. The denial of equal access for student-initiated extracurricular religious speech is not required by any of this Court's decisions construing the Establishment Clause.

As the district court found, this case is "fundamentally different from the traditional school prayer cases." App. C at 96a. Also, as Judge Adams emphasized in his dissent, a distinction of a constitutional dimension exists between a *state*-initiated religious activity in which students may choose to participate and a *self*-initiated, *self*-directed religious activity, which a school merely allows under a neutral policy of equal access for students to meet to discuss their various interests. App. A at 61a (Adams, J., dissenting).

The Third Circuit erroneously applied the Establishment Clause beyond official state action to encompass the self-initiated, self-directed activities of private individuals in an expressive forum in which the only participants are their peers. In contrast, the cases in which this Court has found an Establishment Clause violation have all involved state-initiated religious activity as part of the school's curriculum. *See*, *Jaffree* v. *Wallace*, 705 F.2d 1526 (11th Cir. 1983), *summarily aff'd in relevant part*, 52 U.S.L.W. 3719 (U.S. April 3, 1984) (state composed prayer and state led prayer unconstitutional); *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (state statute and local regulations established prayer led by student "volunteers" in classroom in daily opening exercises); *Stone* v. *Graham*, 449

U.S. 39 (1980) (state statute requiring posting of the Ten Commandments on public classroom walls); *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963) (state laws requiring daily Bible reading and recitation of the Lord's Prayer in public classrooms); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (recitation of a state-composed prayer in public classrooms required by statute); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) (school officials on their own initiative and pursuant to state statute invited only religious outsiders into the school classrooms to conduct religious classes as part of the school curriculum).

II. Confusion exists among federal courts and, therefore, among school administrators as to the constitutionality of accommodating high school students' religious speech on an equal access basis.

The courts below emphasized the uncertainty federal courts face in adjudicating the issue of accommodating high school students' religious speech. Thus, the Third Circuit, fearing an irreconcilable conflict between the Free Speech Clause and Establishment Clause, explained:

> We are thus faced with a constitutional conflict of the highest order. Moreover, in deciding *Widmar*, the Supreme Court explicitly declined to reach the questions that would arise if state accommodation of free exercise and free speech should, in a particular instance, conflict with the prohibitions of the Establishment Clause. We are therefore left with no definitive guidance from the Court as to the proper direction to take in this unique circumstance. App. A at 36a.

Similarly, the district court emphasized the need for guidance from this Court:

> The court is fully aware that the result reached in this case will not be free from doubt unless and until the Supreme Court clarifies two very important areas of the law—the extent to which there can be a 'forum' for students in their high schools and the

> status of prayer in those institutions when initiated by students acting independent of outside influences. App. at 101a.

Due to this confusion in the federal courts, school administrators and state education officials [13] are increasingly confused about the constitutionality of accommodating students' extracurricular religious speech when a high school has chosen generally to permit students' extracurricular speech. As in Williamsport, high school administrators increasingly believe they have no choice but to prohibit students from meeting for religious speech.[14]

The confusion of school administrators is nationwide [15] and has three primary sources: 1) the lack of explicit direction from this Court on the application of *Widmar*

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[13] State departments of education and state attorney generals are under pressure to adopt statewide regulations regarding religious activities in the schools, including equal access. *See, e.g., ACLU, et al.*, v. *Scanlon, et al.*, No. 1181 C.D. 1981 (Pa. Commw. Ct., 1982), *aff'd*, No. 10 M.D. (Pa., April 26, 1983) (initial complaint sought court order to State Secretary of Education to adopt statewide regulations concerning religious activities in the public schools); *Student Bible Group Sparks School Flap*, The Washington Post, March 16, 1984, at 3, col. 3 (school board asks Maryland Attorney General for opinion on constitutionality of equal access).

[14] *See, e.g.*, 130 Cong. Rec. S8333-34 (daily ed. June 27, 1984) (statement of Senator Orrin Hatch) (reprinting letter dated October 28, 1982, from Los Angeles County Counsel to the Administrator of Secondary Education stating that the Establishment Clause prohibits a student group using a room at lunch to read and discuss the Bible). *Hearings on the Equal Access Act: Hearings on H.R. 2732 Before the Subcom. on Elementary, Secondary, and Vocational Education of the Comm. on Education and Labor, House of Representatives*, 98th Cong. 1st Sess. 39-40 (1983) (statement of Luke Thornton, Principal, John I. Leonard High School, Lake Worth, Fla.) (testifying that he is confused about the legality of equal access for religious student meetings).

[15] S. Rep. No. 357, 98th Cong., 2d Sess. 11-14 (1984); H. Rep. No. 710, 98th Cong., 2d Sess. 4-6 (1984).

to high school students' religious speech rights; 2) the inconsistency between *Widmar* and the decisions of lower federal courts prohibiting equal access; and 3) the apparent conflict among decisions in the lower federal courts, some holding equal access for high school students to be unconstitutional *per se* while others indicate that some degree of accommodation is permissible.

A. The lower courts and school administrators need the guidance of this Court.

In *Widmar*, this Court appeared to leave open the possibility that, because of a possible maturity difference, students below the college level might misperceive equal access as state advancement of religion. 454 U.S. at 270 n.14. The Third Circuit and many school district attorneys have interpreted this as a signal that the Constitution does not protect the religious speech of high school students. App. A at 24-25a; *see also, Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982) (citing footnote 14 of *Widmar* to support finding that primary effect prong violated by equal access below college level).

Searching for some guidance from this Court on an issue involving such important constitutional issues, school district attorneys have seized upon the denials of certiorari in several recent equal access cases as confirmation that equal access for high school students' religious speech is constitutionally prohibited.[16] *Lubbock*, 669 F.2d 1038, *reh. denied*, 680 F.2d 424 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983) (a school district policy allowing equal access "before or after regular school hours" for student meetings for "any educational, moral, religious or ethical purposes" held unconstitu-

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[16] *See, e.g.*, 130 Cong. Rec. S8333-34, *supra*, note 14 (letter from Los Angeles County Counsel to school administrator citing denial of certiorari in *Brandon* v. *Board of Education*, *infra*, and footnote 14 of *Widmar* as evidence that equal access is unconstitutional.

tional); *Brandon* v. *Board of Education of Guilderland Central Schools*, 635 F.2d 971 (2nd Cir. 1980), *cert. denied*, 454 U.S. 1154, *reh'g denied*, 455 U.S. 983 (1982) (equal access before school for voluntary student prayer group held unconstitutional); *Johnson* v. *Huntington Beach Union High School District*, 68 Cal. App. 3d 1 (Cal. Ct. App.), *cert. denied*, 437 U.S. 887 (1977) (Establishment Clause prohibits school district from allowing equal access during lunch hour for religious student group).

The importance of the issue of accommodation of students' extracurricular religious speech is underscored by this Court's recent decisions to review two cases involving religious activity on public property: *Jaffree* v. *Wallace*, *supra*, *prob. juris. noted*, 52 U.S.L.W. 3719 (U.S. April 3, 1984) (No. 83-812); and *McCreary* v. *Stone*, 739 F.2d 716 (2d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3285 (U.S. Oct. 16, 1984) (No. 84-277). In neither *Jaffree* nor *McCreary* did a conflict among the circuits exist nor had confusion reached the degree it has on the issue of equal access for students' religious speech.

Moreover, the decisions in those cases will not end the confusion on equal access. As in this case, *McCreary* involves the application of *Widmar* beyond the factual setting of a university and, therefore, raises the issue of the accommodation between the Free Speceh and Establishment Clauses. However, while this case involves the same clash as perceived by this Court in *McCreary*, here it occurs in the far more important context of the public high schools. See App. A at 23a, n.20.

Similarly, in *Jaffree*, the state raised the issue of accommodation of students' religious beliefs in the public high school context, thereby underscoring the importance of the issue in this case. However, while *Jaffree* involves the permissibility of accommodating students' religious beliefs in the public schools, a period of silence does not implicate the basic freedom of speech right claimed by

the Williamsport students and recognized by the Third Circuit. App. A at 36-38a. Furthermore, if a period of silence for prayer or meditation is held constitutional, school administrators may still believe they are compelled to prohibit equal access for *vocal* religious speech. If a period of silence for prayer or meditation as a curricular activity is held unconstitutional, the constitutionality of accommodating students' extracurricular religious speech will remain unresolved.

B. Conflicting decisions of lower federal courts exacerbate the growing confusion among school administrators.

At least two levels of conflict exist among the lower federal courts on the issue of equal access: First, whether the Free Speech Clause protects students' religious speech in a high school forum; and second, whether the accommodation of high school students' religious speech is a *per se* violation of the Establishment Clause.

In *Brandon* and *Lubbock*, the Second and Fifth Circuits held that the Free Speech Clause does not protect high school students' religious speech in a high school forum. *Brandon*, 635 F.2d at 980; *Lubbock*, 669 F.2d at 1048. However, the Third Circuit explicitly held to the contrary in this case. App. A at 36-38a.

The lower federal courts have gone their separate ways on the issue of the accommodation of students' religious speech under the Establishment Clause. In *Brandon*, the Second Circuit held such an accommodation before school to be a *per se* violation of the Establishment Clause. In *Lubbock*, the Fifth Circuit similarly held that a school district policy of accommodation is a *per se* violation, although the holding, perhaps, may be limited to school districts with a past history of impermissible religious activity.[17] In this case, the Third Circuit held

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[17] The *Lubbock* decision is confusing, not only due to its inconsistency with *Widmar*, but also due to: 1) the severe limitation it imposes on school board discretion in developing a policy for extracurricular student groups, and 2) the breadth of its definition of

that accommodation during school hours is a *per se* violation, although it implied that the door might be open for consideration of accommodation before and after school. App. A at 30a n.23, 43a n.30; *but see, id.* at 61-62a (Adams, J., dissenting) (majority adopted *per se* rule prohibiting any prayer in public secondary schools).

In contrast, the Eleventh Circuit in *Nartowicz* v. *Clayton County School District*, 736 F.2d 646 (11th Cir. 1984) (affirming district court order granting preliminary injunction prohibiting school district from allowing equal access for religious student group) indicated that equal access is permissible if "the school district merely accommodates", as opposed to endorses "the students' religious speech." *Id.* at 649. In the Tenth Circuit, a federal district court upheld a school district policy allowing equal access, if the meetings were limited to after—but not before—classes. *Bell* v. *Little Axe Independent School District No. 70*, No. CIV-81-620-T (W.D. Okla., Mar. 14, 1983), *appeal docketed* No. 83-1458, 83-1493 (10th Cir. April 5, 1983), *argued*, Sept. 10, 1984. The court ruled unconstitutional student religious meetings which had been held before classes began. *Id.* slip op. at 17. Finally, in the Sixth Circuit, a federal district court upheld the constitutionality of voluntary student meetings for prayer before classes began. *Reed* v. *Van Hoven*, 237 F. Supp. 48 (W.D. Mich 1965).[18]

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the school day to prohibit equal access from the time the first student boards a school bus in the morning to the time the last student leaves a school bus at night. *See, Lubbock*, 680 F.2d 424, (5th Cir. 1982) (denial of petition for rehearing en banc) (Reavley, J., dissenting) (dissenting judges uncertain as to scope of panel's decision).

[18] A case involving equal treatment for students' religious speech and press rights recently arose in the Eighth Circuit. *Pagitt* v. *Independent School District No. 270*, No. 3-84-712 (D. Minn. filed July 3, 1984) (two students suspended for distributing newspaper solely because its content was religious).

The state courts considering equal access have come to conflicting conclusions: *ACLU, et al.* v. *Scanlon, et al.*, No. 1181 C.D. 1981 (Pa.

C. The fallout of the confusion is costly to both students and school districts.

Although widely criticized by constitutional commentators,[19] the *Brandon* and *Lubbock* decisions have had a national impact far beyond the boundaries of the Second and Fifth Circuits. The *Bender* decision will have a similar effect, if allowed to stand. Besides causing many

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Commw. Ct., July 30, 1982), *aff'd. on procedural grounds*, No. 10 M.D. (Pa., April 26, 1983) (relying on *Widmar*, court refused to enter consent decree in which school districts agreed to prohibit equal access for religious student meetings); *Johnson* v. *Huntington Beach Union High School District*, 68 Cal. App. 3d 1, *cert. denied*, 437 U.S. 887 (1977) (school policy of equal access for religious speech held unconstitutional); *Trietley* v. *Board of Education*, 65 A.D. 201, 409 N.Y.S. 2d 912 (N.Y. App. Div. 1978) (equal access for student Bible club before or after school would violate the Establishment Clause).

The confusion surrounding the constitutionality of equal access also can be seen in cases involving the rights of nonstudent groups to meet on school premises during evenings and weekends. *See, e.g.*; *Country Hills Christian Church* v. *Unified School District No. 512*, 560 F. Supp. 1207 (D.Kan. 1983) (school district required to allow equal access to community religious group on weekends on basis of *Widmar*); *Salinas* v. *School District of Kansas City, et al.*, No. 83-0194-CV-W-8 (D. Mo. Dec. 28, 1983), *appeal docketed*, No. 84-1535-WM (8th Cir. 1984) (school district denial of equal access to community religious group upheld); *Civil Liberties Union of Mass., et al.*, v. *School Committee of Greenfield, et al.*, Civil No. 15281 (Mass. Dist. Ct. Sept. 4, 1984) (school district constitutionally prohibited from denying equal access to community religious group); *see also, Laity and Clergy Concerned* v. *Chicago Board of Education*, No. 83 C 2693 (N.D. Ill. Jan. 20, 1984) (denial of equal access to outside group with religious ties, when outside military groups allowed on campus during school hours, held unconstitutional, although religious nature of group not an issue). *See also, May* v. *Evansville-Vanderburgh School Corp.*, No. EV84-165-C (S.D. Ind., filed June 8, 1984) (devotional meeting before school solely of teachers terminated by school authorities).

[19] *See, e.g., Loewy, supra*, n.9 at 141, 147; Note, *Religious Expression in the Public Forum, supra*, n.9 at 154-55; Note, *Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, n.9 at 507-508.

school administrators to prohibit religious student meetings, the *Brandon* and *Lubbock* decisions have led many school administrators to prohibit all forms of private religious expression on school campus. For example, community service activities by students have been prohibited [20]; religious conversations have been banned between students [21]; individual acts of religious observance have been banned [22]; research papers by students on religious topics have been prohibited [23]; and student yearbooks have been censored.[24]

In addition to the damage done to students' fundamental rights of freedom of religious speech and association, these actions, born of confusion, have damaged the re-

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[20] S. Rep. No. 357 at 16 (benefit dance in school gymnasium for the American Cancer Society by youth group affiliated with the Young Women's Christian Association (YWCA) prohibited by Lubbock, Texas, school district).

[21] *Id.* at 17 (Boulder, Colorado school administrator prohibits group of two or more sitting together for a spiritual discussion).

[22] *Id.* at 18 (Minnesota fourth grader reprimanded for bowing head before a meal). See also, 130 *Cong. Record* S8335 (daily ed. June 27, 1984) (statement of Sen. Hatch) (reprinting letter of El Paso, Texas, school district threatening special education student with review of educational program for engaging in public prayer (the rosary) on school bus and public witnessing of her faith at her school).

[23] S. Rep. No. 357 at 17 (research paper on the Resurrection of Christ unacceptable although papers on breast feeding, suicide notes, and demon possession were acceptable).

[24] *See, School Cuts Bible Club From Book—Literally*, The Palm Beach Post, May 28, 1983, at 1 (using razor blades, school administrators cut pictures of students in the Bible Club from student yearbook for year of Establishment Clause violation); *but cf., Stanton* v. *Brunswick School District*, Civil 83-0464P (D. Me. January 23, 1984) (preliminary injunction ordering school district to allow student to place below her picture in student yearbook a graphic description of effects of execution on person being executed); *Students File Yearbook Censorship Suits*, The Los Angeles Journal, March 2, 1984, at 3 (Montgomery County, Maryland, high school students sue school district for barring student yearbook from publishing 10 pages of pictures showing students holding beer cans and a picture with the words "riding a train high on cocaine").

spect many students previously had for their school authorities.[25] Understandably high school students increasingly perceive the schools and the courts as hostile, not neutral, toward religious expression.[26]

The Senate Judiciary Committee found that the confusion is also financially costly to school districts.[27] School districts now face an expensive dilemma: deny students the right to meet and risk a lawsuit by them and their parents, or permit the students to meet and risk a lawsuit by those opposed to equal access. For economic reasons alone, school districts need resolution of the constitutionality of equal access.

Although Congress has said that the protection of *Widmar* should be enjoyed by high school students,[28] school administrators, as well as federal judges, will remain uncertain until this Court gives explicit guidance as to whether accommodating high school students' religious speech on an equal access basis is constitutionally permissible.

III. The Third Circuit decision frustrates the Congressional objective of the Equal Access Act.

In passing the Equal Access Act[29], members of Congress repeatedly stated their belief that the principles of

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[25] S. Rep. No. 357 at 20; *see also, id.* at 13 (Sonoma, California, school board officially prohibits religious student meetings but informally tells students it will look the other way if they meet).

[26] *Id.* at 19-20; *see also, Lubbock*, 680 F.2d at 426 (Reavley, J., dissenting) (students may be given the impression that the courts and schools are hostile to all religious belief and practice.

[27] S. Rep. No. 357 at 21.

[28] *See, e.g.*, 130 *Cong. Rec.* S8337 (daily ed. June 27, 1984) (statement of Senator Hatfield); *id.* at S8338 (statement of Senator Dixon); *id.* at S8355 (statement of Senator Levin); *id.* at S8356 (statement of Senator Bumpers); *id.* at S8357 (statement of Senator Durenberger); *id.* at S8358 (statement of Senator Biden); *id.* at S8361 (statement of Senator Dole); and *id.* at S8364 (statement of Senator Thurmond).

[29] Title VIII of Public Law 98-377. App. E at 113-14a. The Act was passed by the House of Representatives on July 25, 1984, by a

Widmar should protect the fundamental right of religious speech for secondary school students.[30] Members of Congress also expressed their opposition to the decisions in *Brandon* and *Lubbock*, which they viewed as incorrect and hostile toward religion.[31] Members further believed the district court decision below to be correct.[32] The Senate Judiciary Committee concluded that high school students are mature enough to understand that equal access is a policy of state neutrality toward religion.[33]

Congress passed the Equal Access Act in an attempt to alleviate the confusion of school administrators pending guidance from this Court.[34] However, its success in easing the confusion is presently unclear. For example, the Williamsport School District has already indicated that it believes the Act is unconstitutional due to the Third Circuit decision. App. D at 111a. This perception of a conflict between the federal courts and Congress will exacerbate the already high level of confusion among school officials, students, and their parents.[35]

The Act reflects our Nation's historic tolerance for neutral accommodation of religious beliefs, practices and

---

vote of 337-77, having passed the Senate on June 27, 1984, by a vote of 88-11. The President signed the Act into law on August 11, 1984.

[30] *See* n.28, *supra*.

[31] S. Rep. No. 357 at 6-10, 35-36; H. Rep. No. 710 at 3; *see also, e.g.*, 130 *Cong. Rec.* S8337 (daily ed. June 27, 1984) (statement of Senator Hatfield); *id.* at S8358 (statement of Senator Biden); *id.* at S8359 (statement of Senator Nickles); *id.* at S8361 (statement of Senator Dole).

[32] S. Rep. 357 at 32; *see also, e.g.*, 130 *Cong. Rec.* H7726-27 (daily ed. July 25, 1984) (statement of Rep. Roukema).

[33] S. Rep. No. 357 at 10, 35; *see also*, H. Rep. No. 710 at 4.

[34] S. Rep. No. 357 at 11-14; H. Rep. No. 710 at 4-5.

[35] *See, e.g.*, Hertling, *Education, Legal Groups Draft Guidelines for Equal Access Act*, Education Week, Oct. 3, 1984, at 11 ("The equal-access law passed by the Congress runs counter to decisions in four federal appeals courts, which affect 12 states").

interests. The majority opinion below conveys the opposite message. It teaches high school students that speech is "free" only so long as it is purged of religious content and that government "neutrality" requires invidious discrimination against their own voluntary, self-initiated religious activity. Such "[m]isconceptions over the appropriate roles of church and state learned during one's school years may never be corrected." *Brandon*, 635 F.2d at 978.

CONCLUSION

Equal access represents a sound accommodation of religious speech among students within the framework of the First Amendment. As Judge Adams concluded, "[w]hen the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, the Constitution and the Nation are better for it." App. A at 62a.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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CLERK

No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3284

LISA BENDER; MORRIS BRAGGS, A Minor, By MRS. MARY BRAGGS, His Guardian ad Litem; TONI ROBB; ROBIN KRINER; KERRY HUNTER, A Minor, By MR. & MRS. CARL HUNTER, Her Guardians ad Litem; BRENDA KAY HERZOG, A Minor, By MR. & MRS. LOUIS HERZOG, Her Guardians ad Litem; SHAWN SEEVERS, A Minor, By MR. & MRS. GERALD SEEVERS, His Guardians ad Litem; PETER STRAYER, A Minor, By MR. & MRS. CHARLES STRAYER, His Guardians ad Litem; BRUCE BROSSMAN, A Minor, By Minor, By MR. & MRS. BRUCE BROSSMAN, His Guardians ad Litem; and DENISE MARSHALL, A Minor, By MR. & MRS. DENNIS MARSHALL, Her Guardians ad Litem, and all others similarly situated,

Appellees

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT; OSCAR KNADE, Superintendent of the Williamsport Area School District; RICHARD F. EBERHART, President of the Williamsport Area School Board; JANET C. HARRIS, Member of the Williamsport Area School Board; G. KENT BITNER, Member of the Williamsport Area School Board; ARTHUR E. DUNCAN, Member of the Williamsport Area School Board; JOYCE S. HERSHBERGER, Member of the Williamsport Area School Board; RICHARD L. MERK, Member of the Williamsport Area School Board; GENE SMITH, Member of the Williamsport Area School Board; KERMIT SMITH,

Member of the Williamsport Area School Board; JOHN C. YOUNGMAN, JR., Member of the Williamsport Area School Board; and WAYNE A. NEWTON, Principal of the Williamsport Area High School.

JOHN C. YOUNGMAN, JR., one of the Defendants,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania

(Civil Action No. 82-692)

Argued January 24, 1984

Before: ADAMS, and GARTH, *Circuit Judges*,
and BROTMAN, *District Judge* *

(Opinion Filed July 24, 1984)

OPINION OF THE COURT

GARTH, *Circuit Judge*:

This appeal requires us to resolve the tension between the first amendment free speech claim of high school students meeting in an activity devoted to prayer, and a school district's claim that the Establishment Clause—also found in the first amendment—overrides free speech guarantees in the context of a "limited forum." We resolve this conflict between the two constitutional guarantees in favor of the Williamsport Area School District.

---

* Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

Plaintiffs-Appellees Lisa Bender, et al., are or were students at the Williamsport Area High School. It was their desire to form a student organization within the high school, which would be devoted to prayer and other religious activities, and which would meet during the regularly scheduled student activity period. The school officials, fearing violation of the Establishment Clause of the first amendment, denied the students permission to meet.

The students brought this suit for declaratory and injunctive relief under 42 U.S.C. § 1983, alleging violation of their constitutional rights of free speech and free exercise of religion. After considering the affidavits, stipulations, and depositions of the parties, the district court granted summary judgment in favor of the school district and against the students on the free exercise claim.[1] Relying, however, on *Widmar v. Vincent*, 454 U.S. 263 (1981), the district court agreed with the students that their free speech rights had been abridged, and that, under these circumstances, the Establishment Clause did not provide a compelling state interest to justify that abridgement. The court therefore granted summary judgment in favor of the students and against the school district on the free speech claim.[2] *Bender v. Williamsport Area School District*, 563 F. Supp. 697 (M.D. Pa. 1983). We conclude that the Establishment Clause concerns expressed by the school district must prevail. We therefore reverse.

---

[1] No appeal or cross appeal was taken from this order, nor was the free exercise issue raised in the briefs or at oral argument, and we therefore have no occasion to consider it.

[2] Although the district court entered summary judgment, it did not award explicit injunctive relief against the Williamsport School District. Since the time of the court's judgment, however, the school district has apparently allowed students to meet for religious activities during the regular activity period, in compliance with the district court's opinion.

I.

Because this appeal comes to us from the grant of summary judgment, and given the crucial role which the particular facts play in every first amendment analysis, special care must be taken in reciting the factual setting. Although, in several respects, the record below could have been more fully developed, we agree with the district court that there are no material disputes of fact that would preclude consideration of the merits of this case in the context of summary judgment.[3]

A. The Proposed Activity

Plaintiffs, Lisa Bender, et al. (hereinafter described collectively as "the students") are or were enrolled[4] at the Williamsport Area High School in Williamsport,

---

[3] Furthermore, we note that, in the area of "constitutional fact," an appellate court is free to draw its own inferences from the record. *E.g.*, Block v. Potter, 631 F.2d 233, 241 (3d Cir. 1980). As the Supreme Court recently noted in another first amendment context, the Constitution requires that judges must exercise independent appellate review "in order to preserve the precious liberties established and ordained by the Constitution." Bose Corp. v. Consumers Union of United States, Inc., 104 S. Ct. 1949, 1965 (1984). As a result, we do not defer to the same extent to factual inferences drawn from the record by the district court, as we might in a case not involving constitutional, and in particular, first amendment rights. Factual findings by the district judge or a more developed record, therefore, would not necessarily be required to add to our understanding and analysis. We find that the essential undisputed facts which underlie this case are sufficient on which to predicate our legal conclusions.

[4] Since commencement of this action, all the named plaintiffs have graduated from the high school. Although begun as a class action, no such class was ever certified by the district court. Before us, however, is a motion to add additional plaintiffs who are currently enrolled at Williamsport Area High School and who likewise desire to participate in the activities of the Petros Club. Because the issue presented by this appeal is capable of repetition, *see generally Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974), and because we perceive no prejudice to the school district, we grant this motion.

Pennsylvania. They sought to organize a group known as "Petros," which would "meet for the purposes of [students] aiding each other in his social, emotional and intellectual personal growth and development by prayer, the application of God's Holy Word to their problems and sharing of personal experiences." Complaint ¶ 31, App. at 7. The purpose was also stated to school authorities in the group's application for approval:

PROPOSAL FOR A
NEW STUDENT ORGANIZATION

NAME OF THE ORGANIZATION

πετρα [sic] (the Rock)

NATURE OF THE ORGANIZATION

The organization will be a non-denominational prayer fellowship. Participation will be voluntary and open to all students.

PURPOSE OF THE ORGANIZATION

The purpose of the organization will be to promote spiritual growth and positive attitudes in the lives of its members.

LEADERSHIP

Selection of leaders will be by democratic election. The leaders will be responsible for directing the meetings and coordinating activities in a manner that will carry out the purpose of the organization.

MEETINGS

Regular meetings of the organization will be held on school premises during the Tuesday and Thursday morning activity periods. They will

include Scripture reading, discussion, prayer and other activities which may be of interest to the group.

SUPERVISION

Meetings of the organization will be supervised by a faculty advisor. Student attendance may be verified by the signing of a roster.

App. at 87 ("Proposal for a New Student Organization"). The students asked permission to meet during the school's regularly scheduled activity period. They agreed that they would not use the bulletin boards, newspaper, or public address systems to promote their meetings. App. at 401 (Affidavit of Lisa Bender).

Petros was allowed to hold one organizational meeting, at which approximately forty-five students were present. During the meeting, passages of scripture[5] were read, and students who wished to do so, prayed. After this first session, however, the school administration withheld permission for further meetings pending investigation as to their legality. After consultation with the school's attorney, the Williamsport School Board denied the student's request for permission to meet. The President of the School Board wrote to Bender, stating:

> The solicitor [has] advised the Board that to approve your proposal would be a violation of existing case law and therefore, an improper action. The Board decided, therefore, to deny your appeal.
>
> Please be assured that neither the School Board nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.

App. at 235 (Letter of R.F. Eberhart).

---

[5] The record does not reveal from what source this scripture was derived.

B. The Activity Period

The activity period at Williamsport Area High School is held during a thirty minute time slot regularly provided on Tuesdays and Thursdays, during which student groups may conduct meetings.[6] The school day begins at 7:45 a.m. when all students must be in their homerooms. School supervision of students begins the moment they enter the school premises. App. at 356 (Affidavit of Principal Wayne Newton). The activity period starts at 7:57 a.m., after attendance has been taken in homeroom and the school day has begun. Those students who do not participate in a club may study in the library, visit the school's computer station, examine career or college placement materials, or simply remain in their home

---

[6] Statutory provision for extracurricular activities in Pennsylvania public schools is contained in Pa. Stat. Ann. tit. 24, § 5-511 (Purdon 1962 & Supp. 1983), which provides:

> (a) The board of school directors in every school district shall prescribe, adopt, and enforce such reasonable rules and regulations as it may deem proper, regarding (1) the management, supervision, control, or prohibition of exercises, athletics, or games of any kind, school publications, debating, forensics, dramatic, musical, and other activities related to the school program, including raising and disbursing funds for any or all of such purposes and for scholarships, and (2) the organization, management, supervision, control, financing, or prohibition of organizations, clubs, societies and groups of the members of any class or school, and may provide for the suspension, dismissal, or other reasonable penalty in the case of any appointee, professional or other employe, or pupil who violates such rules or regulations.
>
> . . . .
>
> (c) The board of school directors may permit the use of school property, real or personal, for the purpose of conducting any activity related to the school program, or by any school or class organization, club, society, or group, (2) authorize any school employe or employees to manage, supervise and control the development and conduct of any such activities, (3) employ or assign any school employee to serve in any capacity in connection with any such activities.

rooms until the next class period begins. Participation in activities is completely voluntary, although each student must be on school grounds and accounted for during the activity period. Pennsylvania law requires that students participate in a minimum amount of instruction per year, which is variously calculated as: (1) 180 school days per year, with each day consisting of seven hours, minus 1½ hours for lunch and breaks; (2) a school week consisting of 27½ hours of instruction; or (3) 990 hours of instruction each year. Pa. Stat. Ann. tit. 24, § 15-1504 to 1504 (Purdon Supp. 1983).[7] App. at 366 (affidavit of Principal Wayne Newton).

In the memory of the current principal, who has served since 1974, no proposed student club or activity has ever been denied school sponsorship, other than Petros.[8] The only articulated qualification as to the nature of the ac-

---

[7] We are not told if the activity period count toward the minimum requirement at Williamsport, nor have our own attempts at calculation provided a definitive answer.

[8] As described in a recent school yearbook, student clubs which are currently active include: Student Government; Key Club (a student service organization performing community work); Class Organizations (officers for each class); Business English Club; Future Homemakers of America (devoted to learning good home practices and providing service to various charity organizations); Vocational Technical Club; Spanish Club; Speech and Drama Club; Ecology Club; The *Cherry & White* (student literary art magazine); *Billtown Banner* (student newspaper); *La Memoire* (student yearbook); Band; Choir; Office Aides (assisting in filing, answering telephones, and running errands).

Other clubs which have been approved in the past and might be renewed if interest warranted are the Archery; Art; Audubon; Aviation; Bowling; Chemistry; Chess; Field, Forest and Stream; Future Nurses; Future Teachers; German; Poetry; Photography; and Ski Clubs. App. at 367. (Affidavit of Principal W. Newton).

There is no formal mechanism or procedure for applying for school sponsorship or sanctioned status at Williamsport, other than oral and possibly written request as was done by the students wishing to have Petros recognized as a school activity. *Id.*

tivity allowed during this period is that it "*contribute to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper.*" [9] App. at 367 (Affidavit of Principal Wayne Newton).

It is the policy of the school that each student club have an adult advisor, who is usually a member of the faculty, but may also be another school employee or a parent. App. at 404 (Stipulation of Parties). There is no written policy "concerning the role of adult advisors of . . . clubs or who those adult advisors must be," [10] *id.*, although an advisor or monitor must be present at each student meeting. App. at 366 (Affidavit of Principal W. Newton). The principal has final approval over who the advisor will be. At the first meeting of Petros, a monitor

---

[9] Oscar Knade, Superintendent of the Williamsport Area School District, made the following description of the activity period during his deposition:

> Q: Could you tell me why the Williamsport School District decided to permit student clubs to meet on a general basis?
>
> A: In addition to providing an academic environment, the school district also attempts to provide opportunities to explore certain interests which may have general value to themselves and to the community, service clubs, service organizations or organization [sic] [which are] built around a specific academic interest, such as language club, German club, for example.
>
> Q: This is—could you characterize the purpose of being to help them to grow, not only academically but socially, emotionally, things of that nature?
>
> A: Certainly.

App. at 275-76 (Deposition of Superintendent Oscar Knade).

[10] During depositions, the principal of the high school commented that, generally speaking, the adult supervisor participates in the student group meetings. He stated that "I would expect them to be there as somebody who's going to help the students." App. at 266 (Deposition of Principal Wayne Newton). The principal did not state, however, that such active participation by the advisor was a prerequisite for school sanction.

was present, but used the time to grade papers and took no part in the meeting. App. at 228, 402 (Affidavits of L. Bender).

II.

Our analysis will proceed along these lines:

First, did the student members of Petros have a free speech right guaranteed by the first amendment? To answer this inquiry, we will have to examine whether the school district created a forum, and if so, what kind, i.e. was it "public" or "limited," and if "limited," in what manner?

Second, if, as we conclude, the Williamsport school district did create a forum, limited to accommodating student activities which would promote the intellectual and social development of its students as part of the secondary school educational process, then did the students in the Petros program come within the prescribed parameters of that limited forum so created?

Third, assuming an affirmative answer to the preceding inquiries, may the school district validly object to the presence of Petros within the school, based on the potential violation of the Establishment Clause? The answer to this question, in turn, depends on an analysis of the three pronged *Lemon* tests: (1) would permitting the activity within the school day have a secular purpose; (2) would permitting the activity have the primary effect neither of advancing nor inhibiting religion; and (3) would permitting the activity avoid excessive government entanglement with religion? *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) and *infra* note 20.

Lastly, if we conclude, as we do, that allowing Petros to meet within the school would violate the Establishment Clause, then which of the two provisions of the first amendment should control, where the students, on the one hand, have a free speech right, but the school district, on

the other hand, would be in violation of the Establishment Clause if it permitted the religious activity and speech of Petros? The last stage of our analysis, therefore, requires a balancing process, which, when given effect, we believe sustains the action taken by the Williamsport school district.

III. The Students' Free Speech Rights

We turn then to the first of the substantive legal issues involved in this case. It is the student's contention that, by denying Petros access to the activity period, the school district impinged upon their constitutional rights. Indeed, in order to prevail on their claim, the students must first satisfy us as a threshold matter that they enjoy a first amendment free speech right which was abridged by the refusal of the school district to grant Petros permission to meet. Absent this free speech right, there would be no basis upon which a court could intervene in the operation of a local high school. As the Supreme Court has noted:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate constitutional values.

Epperson v. Arkansas, 393 U.S. 97, 104-05 (1968). It is therefore our task at the outset to decide whether such constitutional values are in fact "directly and sharply" implicated.

A. Public or Limited Forum

In determining the nature of the free speech protections which exist within the school, we of course take note of the general axiom that students do not shed their

rights to freedom of speech or expression at the schoolhouse gate. *E.g., Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Nor is speech any less protected because it is religious in nature. *See Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981). As Justice Powell, writing for the Court in *Widmar v. Vincent*, 454 U.S. 263, 269 (1981), stated, "religious worship and discussion . . . are forms of speech and association protected by the first amendment."

On the other hand, the mere fact that speech is involved and the free speech clause of the first amendment is invoked does not require the government to open the use of its facilities as a public forum to anyone desiring to use them. *See Perry Educational Association v. Perry Local Educators Association*, 103 S. Ct. 948, 954 (1983). As the Supreme Court has noted, the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129 (1981). The State, like any other property owner, can close traditionally non-public facilities from use as a forum for advocacy. *Perry*, 103 S. Ct. at 955; *United States Postal Service* [sic] *v. Vincent*, 454 U.S. 263, 266-67.

We noted in *International Society for Krishna Consciousness v. New Jersey Sports & Exposition Authority*, 691 F.2d 155 (3d Cir. 1982), that:

> The primary factor in determining whether property owned or controlled by the government is a public forum is how the locale is used. Streets, parks and sidewalks are the paradigms of a public forum because they have traditionally served as a place for free assembly and communication by citizens. . . .
>
> . . . .

> Public forum status is not appropriate for a locale where the full exercise of First Amendment rights would be inconsistent with the "special interests of a government in overseeing use of the property."

Id. at 160 (quoting *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980)).

A high school, unlike the public streets and parks, is not by tradition a forum for public expression. *See Perry*, 103 S. Ct. at 955. Clearly, use of school premises as a public forum by anyone or any group desiring to avail themselves of full and unrestricted use of first amendment rights would disrupt the educational purpose of a secondary school and thus be "inconsistent with the special interests of the government." The Williamsport Area School District, therefore, would have been justified in refusing to reserve high school property for use as a public forum for expression, and would violate no constitutional constraints in doing so. *See Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981) (students had no first amendment right to use school drama facilities in order to produce play of their choice).

The Supreme Court, however, has held that, when the state decides, albeit on its own motion, to open its facilities for use as a "limited forum," for particular purposes, it assumes a responsibility to explain its exclusion of a qualified group under applicable constitutional criteria. "Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry*, 103 S. Ct. at 955. *See Widmar v. Vincent*, 454 U.S. 263 (1981) (public forum for a limited purpose such as use by certain groups); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555-59 (1975) (municipal theater was constituted as "public forum," and therefore city could not exclude a particular dramatic production without satisfying constitutional safeguards); *see also City of Madison, Joint School Dis-*

trict No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) (free speech rights attach at school board meeting opened to public).

Although the State may create a "limited forum" for particular groups or specific activities, *Perry*, 103 S. Ct. at 955 n.7., it may not exclude expression that falls within whatever objective parameters it has set. Nor may it exclude a group which is otherwise eligible to use the facility. *See Perry*, 103 S. Ct. at 956 (free speech right to limited forum extends to activities "of similar character").

B. Widmar v. Vincent

It is in the context of distinguishing between a public forum, and a limited or limited open forum, that we examine *Widmar v. Vincent*, 454 U.S. 263 (1981), the principal case upon which the students and the district court rely. In *Widmar*, students at the University of Missouri sought permission, as did the students in Williamsport, to use school facilities for religious activities. They formed a group known as "Cornerstone," and for a time were allowed to hold meetings on school premises. The university withdrew that permission, however, citing school regulations against use of its facilities "for purposes of religious worship or religious teaching."

In a suit brought by members of Cornerstone, the Supreme Court held that, by opening its facilities for general use by campus groups, the university *had* created a forum for its students, and thus it could not make content-based discriminations against particular groups absent a compelling state interest.[11] As Justice Powell noted in writing for the Court:

---

[11] *Widmar* went on to hold that the Establishment Clause did not provide a compelling state interest in that case. *See infra* discussion contained in Part IV. *See generally* Note, *The Rights of Student Religious Groups Under the First Amendment to Hold Religious Meetings on the Public University Campus*. 33 Rutgers L. Rev. 1008 (1981).

> Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.

454 U.S. at 267-68. The Court continued:

> Here UMKC [the University] has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment. In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Id. at 269-70 (citations and footnotes omitted).

C. *The Activity Period at Williamsport as a Forum*

Widmar, of course, bears many similarities to the present case, at least insofar as the students' free speech rights are concerned. In both situations, there exists a policy of open access to state-owned facilities in an educational setting, a policy which certainly implies the existence of some type of forum.[12] Indeed, it is the very

---

[12] *Widmar* and the present case are also similar, however, in that use of facilities was restricted to students. Any forum created would therefore be "limited" at least to the extent that it is not

nature and purpose of any school, be it college or high school, to communicate knowledge. *See Tinker*, 393 U.S. at 312 (public school meant to promote "intercommunication among the students"). The fact that *Widmar* involved a *university*, while we here are concerned with a *high school*, does not mean that we are free to ignore the nature of the free speech rights enjoyed by the students. As is discussed below, however, the opportunity to exercise those rights is not necessarily coextensive with that which exists in an adult environment.

As the Court has noted, "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972). As recent history has demonstrated, the university campus often serves as the spawning ground for novel theorems and intellectual ferment. It should hardly be surprising that there exists within the university (a sanctuary for the heretical as well as the orthodox) the means and facilities by which ideas may be presented and challenged through interactive discussion. The "ability to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communication with the administration, faculty members, and other students." *Id.* at 181-82. The university, therefore, is—at least for its students—a most logical location for an open forum, albeit one limited to the student body.

The educational mission of a high school, in contrast, is more circumscribed. The curriculum consists less, and indeed is less conducive to, of an unfettered inquiry. As a secondary school, emphasis is placed more on a structured program "for 'inculcating fundamental values necessary to the maintenance of a democratic political sys-

---

open to the general public. *See Perry*, 103 S. Ct. at 955 n.7 (noting that *Widmar* involved a "limited open forum" which was restricted as to groups which could use facilities).

tem.'" *Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (Brennan, J., for the plurality). Local school boards therefore commonly "establish and apply their curriculum in such a way as to transmit community values,' and 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'" *Id.; accord, id.* at 876 (Blackmun, J., concurring); *id.* at 879 (Burger, C.J., dissenting); *id.* at 896 (Powell, J., dissenting); *id.* at 913-14 (Rehnquist, J., dissenting).[13]

Since elementary and secondary schools, unlike universities, are not the academic battleground for clashes among contending lines of thought, particularly since the level of student maturity rarely reaches the more advanced level of those attending college, it is unlikely that school authorities would seek to create a truly open forum in a high school environment for unregulated dialogue and inquiry. Because of the inherent nature of a secondary school, any forum created has purposes which are narrower, and uses more exclusive than a forum such as in *Widmar* or one open generally to all forms of com-

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[13] As Justice Rehnquist noted in *Pico*:

> Education consists of the selective presentation and explanation of ideas. The effective acquisition of knowledge depends upon an orderly exposure to relevant information. Nowhere is this more true than in elementary and secondary schools, where, unlike the broad-ranging inquiry available to university students, the courses taught are those thought most relevant to the young students' intellectual development. Of necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information *not* to present to the students is often as important as identifying relevant material. This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.

Board of Educ. v. Pico, 457 U.S. 853, 914 (Rehnquist, J., dissenting).

munication by the public. In determining the type of forum, if any, created by secondary school authorities such as the Williamsport Area School District, therefore, we must take into account, among other things, the level of maturity of the students and the nature of the academic program involved. *See Seyfried*, 668 F.2d at 219 (Rosenn, J., concurring) ("court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the later grades of secondary school"); *see generally Tinker*, 393 U.S. at 506 (first amendment must be "applied in the light of the special characteristics of the school environment").

Nevertheless, nothing precludes the existence of a forum in a high school setting. The best indication of the accommodation afforded in this case to the students comes from the school district principal's own description of the activity period, in which he states that "*any student activity or club which is considered to contribute to the intellectual, physical or social development of the students*" would likely be approved.[14] The roster of clubs which exist or have existed at Williamsport reveals a wide range of pursuits and interests, which do not indicate adherence to any curricular plan or educational scheme, beyond this general criterion. *See supra* note 9. Indeed, as the district court noted and as the school authorities themselves stated, no organization proposed by students has ever been denied permission to meet during the activity period. The record therefore reveals that the activity period at Williamsport Area High School provides a forum for self-expression, by which students exercise their own discretion in deciding which organization, if any, to support. Indeed, unlike compulsory instructional classes, which are created and designed by the school authorities, the very existence of such organizations depends entirely upon voluntary student participation and interest.

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[14] *See supra* note 9 and accompanying text.

Unlike the case of prisons[15] or military bases,[16] the exercise of this qualified freedom to participate in the group of one's choice is quite consistent with the special purpose for which the high school is intended—the preparation of youth for adult life and adult decisions. It is true that other school boards may have preferred to limit permissible club activities to those which were directly related to a particular curricular offering, but that is not the case here. It is apparent on this record that the Williamsport school district finds merit in its activity period as an educational tool,[17] and we agree with the district court that there is no indication, nor indeed any contention made, that the activity period is tied to the formal curriculum of the school.[18] *See Bender*, 563 F.

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[15] *See* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (prison not a public forum).

[16] *See* Greer v. Spock, 424 U.S. 828 (1976) (military installation not a public forum).

[17] Presumably, the Williamsport school authorities enacted the activity period pursuant to Pa. Stat. Ann. tit. 24, § 5-511 (Purdon 1962 & Supp. 1983), quoted *supra* note 6. None of the parties has suggested that implementation of such an activity period was, as a matter of state law, beyond the school board's power and discretion. While it is true that the statute refers to "activities related to the school program," that clause is capable of broad interpretation, and would not necessarily limit activity periods to organizations linked directly to a curricular offering. There has been no inference, nor do we find support for the contention, that the statute forbids the kind of broad activity period allowed in Williamsport.

[18] Another indication that the activity period is not curriculum-related can be derived from the identity of some of the clubs presently approved or approved in the past. *See supra* note 8 (listing student clubs). For instance, the Key Club, a service and community organization, has little direct relevance to normal course offerings. Likewise, the Chess Club, the Aviation Club, and the Office Aides, among others, have at best only tangential relation to a high school course of study.

While it might be said that each of these activities enhances the curricular goals of the school by promoting civic awareness (the

Supp. at 707. Thus, the latitude allowed to student groups, and the manner in which it encourages students to exercise independent judgment, supports the conclusion that the Williamsport Area School District did indeed create a forum—albeit a limited one—restricted to high school students at Williamsport and also restricted to the extent that the proposed activity promote the intellectual, physical, or social development of the students. *See International Society for Krishna Consciousness*, 691 F.2d at 160 (noting in dictum that, "[s]ince the exchange of ideas is an essential part of the educational process, but the need for discipline and order is great, a public high school is probably a limited forum").

We therefore must determine whether the activities of Petros fall within the parameters of the limited forum as it exists at Williamsport. It is clear to us that religious discussion, religious study, and even prayer, fall within the articulated qualification that student organizations promote the intellectual and social welfare of students. The Constitution, of course, in no way requires that, because establishment of religion is forbidden, religious activity must be deemed unintellectual or irrelevant to a student's social growth. Since the scope of the activity period has been framed in terms so broad that virtually any program which can be said to benefit the development of the students is permissible, we are able to conclude without further discussion that the activities of Petros fall within the bounds of a "limited forum" as it exists at Williamsport Area High School. The stu-

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Key Club), logical thought (the Chess Club), practical applications of scientific principles (Aviation Club), or a general sense of responsibility (Office Aides), the same extended chain of reasoning could be used to justify religion as a promoter of civic, social, and intellectual values. Thus, the roster of activities approved in the past reveals no more restrictive a limitation on the activity period than that which has already been articulated, i.e., that clubs promote the "intellectual, physical, or social development of the students."

dents members of Petros, therefore, have a valid first amendment interest to engage in their proposed activity.

IV. The Establishment Clause

Having found that a limited open forum was created within the high school, such that the students' free speech rights were implicated, we must now determine whether the school may constitutionally impose restrictions on those rights.

It first should be noted that the restriction which the School Board would seek to place on "Petros" is content-based, since it is undisputed that the students were denied permission to organize Petros solely because their activity was religiously oriented. Thus, any restriction which was placed on Petros cannot be justified as a "time, place or manner" limitation, which must be content neutral. *E.g. Heffron v. International Society for Krishna Consciousness*. 452 U.S. 640, 647-48 (1981). Moreover, because the restriction imposed by the school district in denying permission for Petros to meet is content-based, Williamsport ("the State") must demonstrate that it is narrowly drawn to meet a compelling state interest. *E.g.*, *Widmar*, 454 U.S. at 270. The sole justification advanced by Williamsport for denying Petros permission to organize is that such permission might violate the Establishment Clause. As noted in *Widmar*, "the interest of [the school] in complying with its constitutional obligations *may* be characterized as compelling." *Id.* at 271 [emphasis added]. We first examine the situation presented in Williamsport to determine if in fact an Establishment Clause violation would be made out if Petros were allowed to meet.

The relevant text pertaining to the Establishment Clause appears in the first amendment as "Congress shall make no law respecting the establishment of religion.

. . ." [19] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1970) articulated the traditional test for whether state action comports with the Establishment Clause. The three prongs of the test are: (1) does the proposed action have a secular purpose; (2) would it have the primary effect which neither advances nor inhibits religion; and (3) would such action avoid excessive government entanglement with religion? Unless all three inquiries are answered affirmatively, the action taken by the state violates the Establishment Clause. Transposed to the instant case, we frame the questions to be answered as follows: (1) if the school district had permitted Petros to conduct its activity, as the Petros students desired, would that permission, if granted, have a secular purpose; (2) if the school district permitted Petros to meet, would that action neither advance nor inhibit religion; and (3) assuming that the school district allowed the Petros activity, in doing so would it avoid excessive school or government entanglement with religion? If the answer to all three of those questions is uniformly "yes," then no Establishment Clause violation would have occurred if permission to Petros had been granted and the school district would then have erred in denying Petros' right to meet, because then its action encroached upon the students' free speech rights.

On the other hand, if *any* one of those three questions, as we have stated them, is answered "no," then the school district has raised a palpable and legitimate Establishment Clause defense, and the analysis must con-

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[19] U.S. Const., amend. I. The amendment provides in full:

> Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Establishment Clause has been made applicable to the states by incorporation into the fourteenth amendment. *See* Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

tinue to determine whether, in this case, the merits of that defense are sufficient to override the students' free speech claims.[20]

A. *Secular Purpose*

Perhaps the most fundamental requirement of the Establishment Clause is that state action have a valid secular purpose, and that religious considerations may not motivate governmental decisions. A purpose which is nonsecular, however, will not be inferred lightly. *Lynch*, 104 S. Ct. at 1362-63 (1984). In the present case, no assertion has been made that the Williamsport School District *created the activity period* for anything other than valid educational purposes. Indeed, it would be highly ironic if the school district, which has been *opposing* introduction of Petros into the school environment throughout this litigation, and which has prosecuted this appeal in an effort to vindicate its judgment that the Establishment Clause prevents Petros' activity, were to be charged with a religious motive or with intent to benefit religion because it has sought to accommodate all student programs. The secular benefit of establishing such an activity policy is manifest.

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[20] Although the Court has recently noted that the *Lemon* tests are not the exclusive criteria for determining whether the Establishment Clause has been violated, Lynch v. Donnelly, 104 S. Ct. 1355, 1361-62 (1984), we observe that the *Widmar* analysis was confined to the three pronged *Lemon* test. Indeed, it has been urged upon us by the student members of Petros that this case is no more than an extension of *Widmar*. We also observe that the district court employed the same *Lemon* analysis. Recognizing that the *Lynch* discussion (creche in public area) involved a wholly different aspect of the Establishment Clause than is pertinent here, where religious activity in public schools is at issue, we are persuaded that the analytical framework set out above is the appropriate mechanism by which to measure the school district's actions. Indeed, in *Lynch* itself, even though it involved different considerations, and even though it indicates that there may be other tests to determine if the Establishment Clause has been breached, the Court, significantly, applied only the tripartite *Lemon* test.

We therefore conclude that, in establishing a general activity program of the type disclosed by the record, Williamsport had no religious objective or nonsecular purpose. *See Brandon v. Board of Education*, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). Its stated purpose, as we have discussed earlier, was only to "contribute to the intellectual, physical or social development of the students." *See supra* note 9 and accompanying text. Thus, we have no reservation in answering "yes" to *Lemon's* first question: "would granting permission to conduct Petros' activity have a valid secular purpose?"

B. *Primary Effect: Would Permitting Petros to Meet Advance or Inhibit Religion?*

We encounter greater difficulty in considering whether the second *Lemon* test has been satisfied, i.e. whether the policy of allowing religious groups access to an otherwise open forum would have the effect of advancing religion. Justice O'Connor, in her concurring opinion in *Lynch v. Donnelly*, 104 S. Ct. 1355, 1368 (1984) states the issue thus: "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."

The question of religious "effect" was discussed extensively in *Widmar*. The Court noted, inter alia, that the policy of accommodating religious groups in university facilities would not lead to the perception that the school was promoting religion. "University students are, of course, young adults. They are less impressionable and should be able to appreciate that the University's policy is one of neutrality toward religion." 454 U.S. at 274 n.11 [sic]. The Court also found that granting a religious organization permission to use school facilities "would no more commit the University. . . to religious goals than it is 'now committed to the goals of the Students for a Democratic Society, the Young Socialist Alli-

ance,' or any other group eligible to use its facilities." *Id.* The Court noted that the forum at the University of Missouri was available to over one hundred student organizations. "The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Id.* at 274. The Court therefore concluded that allowing a religious group to meet on campus would not violate the Establishment Clause. In Justice O'Connor's terms, as expressed in *Lynch*, allowing a religious group to meet on a public university campus would not have the effect of communicating a message of government endorsement of religion. *See Lynch*, 104 S. Ct. at 1368.

In the matter before us, however, different considerations present a more serious question of state advancement or endorsement of religion than was present in *Widmar*. All are an outgrowth of the differences between a high school and a university. While we discussed in Part III of this opinion that such differences did not dictate a result contrary to the result reached in *Widmar* insofar as the students' free speech rights were concerned, we find that the special circumstances inherent in a high school create heightened dangers in the context of the Establishment Clause. This difference between a secondary school and a university distinguishes *Widmar* from this case.

As the *Widmar* Court itself noted, high school students stand in a very different position than university students in terms of maturity and impressionability. 457 U.S. at 274 n.11 [sic]; *accord*, *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971). They thus would be less able to appreciate the fact that permission for Petros to meet would be granted out of a spirit of neutrality toward religion and not advancement. Compounding this problem is the more obvious presence which a religious group would unavoidably have within a high school setting. Unlike universities, attendance for most high school students is made compulsory by state law. Moreover, high

school instruction is given in a structured and controlled environment and in more confined facilities than is usual in the open, free, and more fluid environment of a college campus. Thus, the possible perception by adolescent students that government is communicating a message of endorsement of religion if it permitted a religious group to meet would be vastly different in a high school setting than the perception of such action by college students in a college setting.

In Williamsport, for instance, meetings of Petros would be held in a classroom which, a few minutes after the meeting, is also used for regular secular classes. Within this more restricted environment, therefore, involuntary contact between nonparticipating students and religious groups is inevitable. Students of differing or conflicting creeds would therefore be less able to overlook the activities of such a group within their school, and by the same token would be more likely to perceive a message of endorsement by school authorities that religious activities were approved.

Moreover, the record here discloses that such activity was to be monitored by a teacher, parent, or other adult. It is true that the monitor was not required to participate in the program's activities, although many adult supervisors did so. As we have noted earlier, the principal of the high school stated that he would "expect them [the adult monitor] to be there as someone who's going to help the students." *See supra* note 10. At the first Petros meeting, a monitor was present, but took no part in the proceedings. While the students in their affidavits characterized the monitor's activities as benign and neutral, designed only to maintain order, it is readily apparent that a school teacher or someone associated with the school necessarily must impart the impression to students that the school's authority and that the school's endorsement is implicated in the relevant activity, since every monitor must be approved by the

school. Even a parent undertaking the role of monitor would necessarily be perceived as a school authority. It goes without saying that no such authority figure or government endorsement was part of the *Widmar* activity program, undoubtedly because of the age and maturity difference of the students. When the monitor factor is added to the other considerations which we have discussed under the "effects" test of *Lemon*, it becomes evident that, if Petros were allowed to meet under these circumstances, Williamsport would be perceived as endorsing and encouraging religious practice.

The constitutional significance of the fact that organized religious activity occurs within the physical confines of a public school, and given its foreseen effects as well as the established limitations placed on school accommodation and involvement, is demonstrated by the coordinate cases of *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), and *Zorach v. Clauson*, 343 U.S. 306 (1952). In *McCollum*, the Court considered the propriety of using public classrooms for voluntary religious instruction, during the hours of compulsory attendance. It found such a practice violative of the Establishment Clause, noting that:

> The foregoing facts. . . show the use of tax-supported property for religious instruction and the close cooperation between school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend religious classes. This is beyond question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread

> their faith. And it falls squarely under the ban of the First Amendment. . . .

333 U.S. at 209-10.

In *Zorach*, however, the Court approved the practice of allowing students release time so that they could attend religious instruction away from the school during class hours. It noted that "this 'release time' program involves neither religious instruction in public classrooms nor the expenditure of public funds." 343 U.S. at 308. Thus, the only affirmative act by the school was allowing students to leave the premises early. The Court found no constitutional infirmity when "[t]he public schools do no more than accommodate their schedules to a program of outside religious instruction." *Id.* at 315. Reading *McCollum* and *Zorach* in conjunction, therefore, reveals the sensitivity of the Court's concerns when the subject of public school accommodation of religious activity is involved.

In the present case, the activity period in which Petros would meet occurs within *school* classrooms *during the hours of compulsory attendance*. It therefore presents many of the circumstances which *McCollum* found constitutionally unacceptable. We recognize that the facts of this case and those of *McCollum* differ, since in *McCollum*, there was no valid secular purpose in providing classrooms for religious instruction, and therefore it arguably did not meet even the first *Lemon* test. Moreover, in *McCollum*, only religious activity was allowed special access to school facilities, while here such access is provided to wide range of groups as part of a larger program of extracurricular activity. Nevertheless, the Court did not find special treatment of religious activity to be constitutionally defective in *Zorach*, provided that such activity was removed, and took place *away* from the school premises. We find that distinction to be critical.

Seeking to ameliorate the impact of religious activity within the school, the students emphasize that their activity is "non-denominational," and therefore its existence within the school would not induce the social fragmentation and divisiveness which the Establishment Clause was intended to prevent. We cannot ignore, however, the reality that, in practice, any meaningful religious activity must cater to some subset of spiritual beliefs and exclude others. By definition, at the least it excludes those who espouse no religious beliefs at all.[21] We believe that once activity is found to be religious, as the activities of Petros concededly are, then the potential for divisiveness and sectarian dispute is raised, no matter how accommodating the actual practice may be.[22] It is there-

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[21] We note that the very name by which the group in Williamsport chose to call itself has special significance for the Christian faith. The word "Petros" is a transliteration of the Greek word "πετρος" ("rock") and is the root of the Latin words "Petrus" ("Peter") and "petra" ("rock"). It figures prominently in the New Testament:

> Et dico tibi, quia TU ES *PETRUS*, ET SUPER HANC *PETRAM* AEDIFICABO ECCLESIAM MEAM, & portae inferi non praevalebunt adversus ea. [Vulgate Version].
>
> And I say to you that THOU ART *PETER*, AND UPON THIS *ROCK* I WILL BUILD MY CHURCH, and the gates of Hell shall not prevail against it. [King James' Version]

Matthew 16:18. Indeed, the Latin version of the text highlighted above is inscribed on the inner dome of St. Peter's Basilica in Rome, which according to legend is literally "built upon" the bones of St. Peter.

[22] We believe that once an activity is deemed to be "religious," the degree of partisanship toward a particular denomination does not, and cannot, affect the constitutional analysis. If religious activity is to be allowed under the rubric of free speech, then it must be permitted without further regard to its content, i.e. whether or not it is "nonsectarian." The only issue which can be relevant to the establishment clause analysis is the threshold determination of whether the challenged activity is indeed "religious," as the activity here admittedly is.

Indeed, if the courts were to establish the degree of sectarianism as a part of the Establishment Clause tests, then they would them-

fore not appropriate for us to inquire further into the teachings in question in order to determine whether they embrace an ecumenical spirit.

Unlike a university, where it is generally understood that a student is, with reason, responsible for the conduct of his or her own affairs, the behavior of a high school student is subject to the constant regulation and affirmative supervision of adult school authorities. Indeed, during the time that students are present on school premises, the State does stand, in large measure, *in loco parentis*. As we noted earlier in this opinion, there are some limitations as to the manner of regulation which the school may impose when students attempt to exercise rights of expression. Yet we think it asking much of a thirteen, fifteen, or seventeen year old student to comprehend the subtleties and intricacies of the first amendment about which judges and legislators themselves find reason to pause.[23] It is the rare case in which high school

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selves be engaging in impermissible entanglement by the very act of applying those tests, since it is not appropriate in this context for the judiciary to evaluate contrasting theologies. As the Supreme Court has noted, it is a difficult enough task to determine whether a particular activity is indeed "religious." *Widmar*, 454 U.S. at 272 n.11 (quoted *supra.*) Making a further determination as to whether such activity is partial to a particular sect is well beyond the pale of judicial functions.

[23] *See Religious Speech Protection Act: Hearing on H.R. 4996 Before the Subcomm. on Elementary, Secondary, & Vocational Education of the House Comm. on Education & Labor*, 98th Cong., 2d Sess. (1984); *Equal Access Act*, H.R. Rep. No. 710, 98th Cong., 2d Sess. (Report to House to accompany H.R. 5345); Amendment No. 3152 to S. 1285, 98th Cong., 2d Sess. (1984); 130 Cong. Rec. H3855-79, H3901 (daily ed. May 15, 1984) (House debate on H.R. 5345); 130 Cong. Rec. S8331-S8370 (daily ed. Jun. 27, 1984) (Senate Debate on Amendment No. 3152 to S. 1285). Both H.R. 4996 and H.R. 5345 would have provided that no federal education funds may be obligated or expended to any state or local educational agency which discriminates against meetings of students in public secondary school who wish to meet voluntarily for religious purposes. Amendment No. 3152 to S. 1285 would provide a civil remedy to

students attempt to engage in programmed activity during the hours of compulsory attendance without the permission, much less in defiance of the wishes of the school, and are successful.

Activity which is permitted to exist within the school, therefore, especially when conducted in the constant presence of school-appointed monitors, carries with it the impression of official approval and endorsement, particularly when the state compulsory educational system encourages attendance at meetings of such groups.

As noted by Justice Frankfurter:

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing not to say fusing, what the Constitution sought to keep strictly apart.

McCollum, 333 U.S. at 231 (Frankfurter, J., concurring). Since it is the public schools which provide the most prolonged and involved contact which our youth enjoy with the State, and indeed, for many, the public schools may appear as an institutional symbol for the government in general, any practice which communicates sanction by the school of religious activity amounts to an Establishment Clause violation. The second question we posed at the outset of this analysis asks "if the school district permitted Petros to meet, would that action

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protect group prayer activity which took place outside of school hours.

See generally Drakeman & Seawright, *God and Kids at School: Voluntary Religious Activities in the Public Schools*, 14 Seton Hall L.J. 252 (1984); Comment, Widmar v. Vincent *and the Public Forum Doctrine: Time to Reconsider Public School Prayer*, 1984 Wis. L. Rev. 147 (1984); Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 Geo. L.J. 135 (1983); Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983).

neither advance nor inhibit religion?" Our discussion reveals that the answer, in light of the authorities and the record in this case, must be "no," and we are therefore left with the conclusion that the presence of religious groups within the school during the curricular day has the effect of advancing religion, in that it communicates a message of government endorsement of such activity. *See Lynch v. Donnelly*, 104 S. Ct. 1355, 1368 (1984) (O'Connor, J., concurring).

We do not suggest that a school board has a duty to propagate falsehood among its students by denying the very existence of religion. "The metaphor of a 'wall' or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis." *Gillette v. United States*, 401 U.S. 437, 450 (1971). However, the Establishment Clause does become implicated when the existence of religion within the school creates the perception among schoolchildren that the State has approved a religious activity and thus has placed its imprimatur on religion. We believe that the danger of communicating such state approval of religion is presented in this case.

C. *Excessive Entanglement*

Since we have already determined that the primary or direct effect of permitting Petros to meet would be to advance religion, we need not dwell overly long on consideration of the third prong of the test, i.e. whether permitting Petros to meet would engender "excessive entanglement" with religion.

As distinct from the "effects" test, which is concerned with the substantive effect of state action, the entanglement test is "essentially a procedural problem." [24]

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[24] *But see* Roemer v. Board of Public Works, 426 U.S. 736, 755, 768-69 (1976) (White, J., concurring) (excessive entanglement test is redundant and accomplishes no more than secular effect test under a different label).

Roemer v. Board of Public Works, 426 U.S. 736, 755 (1976) (Blackmun, J., for the plurality). Government must avoid excessive entanglement with religion where "continuing state surveillance will inevitably be required to ensure that [the] restrictions [of]. . . the First Amendment [are] respected." *Lemon*, 403 U.S. at 619. The usual setting for an entanglement clause violation is when a state official, in order to avoid giving state aid to religion, must make determinations as to what activity or material is religious in nature, and what is secular, and therefore permissible. *See Lemon*, 403 U.S. at 615-22; *see also New York v. Cathedral Academy*, 434 U.S. 125 (1977).

We have already discussed, in the context of the "effects" test, the fact that Petros would conduct its activity during the school day, within school premises, and under the official supervision of a school monitor, thus lending the official support of the school at Petros meetings, and putting the school in a position of governance over religious activity. It would also appear that these circumstances, apart from their applicability to the effects test, create the type of "intimate and continuing relationship" between church and state with which the entanglement test is concerned. *See Lemon*, 403 U.S. at 621-22.

Furthermore, we note that Petros, in an attempt to lessen the effect of the Establishment Clause on the permissibility of their meetings, represented that it would voluntarily agree not to use the school's bulletin boards or public address system in connection with their activities. This arrangement in itself, however, raises entanglement concerns. In order to enforce this agreement, school authorities would be required to police the activities of Petros as new students took over the organization, to insure that no religiously oriented material was posted on the bulletin board, published in the school newspaper, or announced over the public address system.

If any such material could indeed be free of religious content, a matter about which we have some doubt because of the nature of the Petros activity, the school officials would be constantly required to interpret the posted announcements in order to distinguish religious from non-religious content. It is this very situation, however, which the entanglement test addresses. "[I]f the state must engage in continuing administrative supervision of nonsecular activity, church and state are excessively intertwined." *Brandon*, 635 F.2d at 979.

We reach this conclusion with the knowledge that, in the context of a *university*, the *Widmar* Court has suggested that prohibition of religious meetings may actually exacerbate entanglement:

> We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U.S. at 272 n.11 (citations omitted). We have doubts, however, that *Widmar* dictates that the prohibition of religious activity from a public high school itself creates an excessive entanglement. Although it would, to some extent, require the surveillance of school authorities in order to ensure compliance with this restriction, we note that such supervision has already existed at least implicitly in our schools since the Supreme Court interpreted the Constitution as banning officially organized prayer. *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203

(1963). It would be somewhat peculiar to suggest that the Supreme Court itself created excessive entanglement in so doing. And recently, in *Mueller v. Allen*, 103 S. Ct. 3062, 3071 (1983), the Court held that the entanglement test is not violated when state officials are required to distinguish secular textbooks from religious textbooks, at least on the simpler and less eclectic level of the secondary school curriculum.

In considering the entanglement feature of the *Lemon* tests, moreover, at least as applied to the Williamsport school district situation, our unease stems not so much from the metaphysical concerns which we have just recited, but more from the fact that the activities in which Petros intends to engage will be conducted during school hours, on school premises, and under official school supervision, and thus be subject to the possibility of state and school liability and to the school's responsibility to maintain safety, order, and a secular schedule. *See Brandon*, 635 F.2d at 979. The discharge of these functions by the school not only gives the appearance of official state endorsement of religion, but, in practice, would require involvement by school officials in activities proscribed by the Establishment Clause. If, for example, a student member of Petros objected that a prayer would violate his or her religious beliefs, the school monitor could very well be put in a position of settling such a controversy and thereby involve the school's authority in reaching a determination with respect to the validity of various religious beliefs and practices.

Thus, to answer the third *Lemon* test question which we put: "assuming that the school district allowed the Petros activity, would it avoid excessive school entanglement with religion," the answer must undoubtedly be "no."

V. Reconciling Free Speech with the Establishment Clause

Our analysis has thus advanced to that aspect of this case which is, in many ways, the most troubling. We have already concluded that the students of Petros enjoy a free speech right to engage in religious activity.[25] We have also held, however, that allowing such religious activity would violate the mandate of the Establishment Clause. We are thus faced with a constitutional conflict of the highest order. Moreover, in deciding *Widmar*, the Supreme Court explicitly declined to "reach the questions that would arise if state accommodation of free exercise and free speech should, in a particular instance, conflict with the prohibitions of the Establishment Clause." 454 U.S. at 273 n.13. We are therefore left with no definitive guidance from the Court as to the proper direction to take in this unique circumstance.

A.

Two other courts of appeals have addressed circumstances comparable to those presented here, but for various reasons did not reach the ultimate question raised in this case of how to reconcile free speech with the proscriptions of the Establishment Clause. In *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983), the Fifth Circuit considered a suit brought against the school district challenging that dis-

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[25] While our analysis to this point is compatible with that found in Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), we do not read *Brandon* as holding that high school students, such as those who are members of Petros, would have a valid first amendment interest to engage in religious speech. *See infra* text at pp. 47-48, discussing *Brandon*. That interest, as we have discussed earlier, was firmly established *by Widmar*. *Brandon*, it should be noted, was filed approximately a year before *Widmar* was decided.

trict's stated policy of accommodating individual student prayer. No student claiming first amendment rights was a party to that suit however, and thus the constitutional conflict present here was not properly before the *Lubbock* court.[26] It should be noted that *Lubbock* involved a situation in which the school district itself attempted to promote religious activity by adopting a policy explicitly tailored to accommodate only such programs and no others. *See Lubbock*, 669 F.2d at 1041 n.7 (quoting school district's policy on religious activity). Moreover, the Lubbock School District had a long history of attempting to promulgate policies which sanctioned organized religious programs within the school. *Id.* at 1039-40. The *Lubbock* court found, therefore, that the policy of accommodating religious groups had a nonsecular purpose, a circumstance not present here. It thus appears that *Lubbock* did not present a true conflict between free speech and the Establishment Clause. In *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), a group of students seek-

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[26] In response to the *Lubbock school district's* argument that it was merely attempting to protect the students' free speech and free exercise rights, the *Lubbock* court did note that a high school was not converted into a public forum merely because student meetings were held there, and thus it found that there was no free speech right implicated which might prevail against Establishment Clause concerns. Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, 1048 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983).

Lubbock did not, however, analyze the factual setting in depth to determine whether there was an intent by school officials to accommodate student expression sufficient to create a forum. Nor are there sufficient facts recited in the opinion by which it can be determined independently whether such a forum could indeed have been found to exist. Presumably the absence of a properly presented free speech claim by an aggrieved student made that analysis unnecessary in *Lubbock*. We do not think that the general statements made by the Fifth Circuit about the *Lubbock* High School, therefore, need be construed as conflicting with our conclusion that a type of forum did exist at the *Williamsport* Area High School.

ing to engage in voluntary prayer asserted their own rights to free speech against a school district which denied them permission to meet on school property. The Second Circuit found, as we do here, that such activity raised concerns which are addressed by the Establishment Clause. The court did not, however, address the conflict with which we are confronted, since it found that "a high school was not a 'public forum' where religious views can be freely aired," and therefore there was no countervailing free speech right. *Id.* at 980. While it noted that high school students may have a right to political speech under *Tinker*, "sensitive Establishment Clause considerations limit their right to air religious doctrine."[27] *Id. Brandon*, however, was decided prior to the Supreme Court's determinations in *Widmar*, and therefore it did not have the benefit of that instructive decision in its evaluation of the students' expression rights. We therefore treat this question as one of first impression.

B.

In creating two clauses within the Constitution which at times are in unavoidable tension, we can only assume that the Framers intended some sort of compromise and accommodation to be reached between them. Although the Supreme Court has noted, for instance, that the Establishment Clause "may" provide a compelling state interest which would override free speech rights (*Widmar*, 454 U.S. at 271), it clearly did not state that such supersession would be automatic whenever the two clauses conflict. Such a holding would place the Establishment Clause in a position of permanent supremacy over the free speech clause, a constitutional heirarchy which we

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[27] Under our analysis, of course, the Establishment Clause is part of an affirmative *defense* against a free speech claim, not a limitation on the *definition* of that right. We may not, therefore, avoid the constitutional conflict by using the Establishment Clause to find in the first instance that no speech right exists.

do not think the Framers intended. We must therefore probe for flexibility within each provision, recognizing that neither clause can be absolute in its terms and effect when it is in conflict with the other.

This element of compromise already exists within traditional free speech analysis, since the right to expression can be curtailed when a compelling state interest is present. We believe that the Establishment Clause, perhaps somewhat more indirectly, allows for the same accommodation. Examining the *Lemon* tests, it can be seen, for instance, that only *excessive* entanglement in religion is prohibited. "Excessive" is of course a relative term whose meaning may change with the circumstances, and therefore the restrictions derived from this test may be less encompassing when a conflicting free speech right is involved.

Likewise, the second *Lemon* test, i.e. whether the primary effect of the proposed action would be to advance or inhibit religion, also does not deal only in absolutes. The underlying analysis is whether an action has such a strong influence which affects religion that it has broached the permitted boundaries, and should therefore be labelled as "primary." *See Widmar*, 454 U.S. at 273-75 (weighing several factors in determining if effect is "primary"). Although framed in terms of "primary" and "indirect" effect, when actually deciding whether a given action impermissibly advances or inhibits religion, the ultimate judgment is still one of degree. Whether an action has the undue effect of advancing religion is therefore not a black or white decision; rather, at some point on a continuum one reaches the breakpoint, beyond which the effect is impermissible and thus qualifies as "primary." That breakpoint, however, is never rigidly fixed: rather, it may vary if pressed by another fundamental constitutional interest. In the words of Chief Justice Burger, writing for the Court in *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361-62 (1984):

> In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." The line between permissible relationships and those barred by the Clause can be no more straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

(Citations omitted).

Thus, while it is true that the Establishment Clause *might* provide a compelling state interest to restrain speech, it does not do so in every case. The parameters of the Establishment Clause may bend somewhat in order to accommodate another fundamental interest—free speech, just as the speech clause must, depending on the circumstances, accommodate the objectives of the Establishment Clause.

In those cases in which there is a true and uncontrived conflict between the free speech clause on the one hand, and the Establishment Clause on the other, we believe that the appropriate analysis requires weighing the competing interests protected by each constitutional provision, *given the specific facts of the case*, in order to determine under what circumstances the net benefit which accrues to one of these interests outweighs the net harm done to the other. Recognizing that, under these circumstances, some constitutional protections must unavoidably be abridged, we believe that our role is to maximize, as best as possible, the overall measure of the fundamental rights created by the Framers, by deciding which course

of action will lead to the lesser deprivation of those rights.[28]

We therefore turn to consideration of the circumstances before us. The facts of this case concededly present a close question. In sum, however, we conclude that the interest in protecting free speech within the context of the activity period as it exists at Williamsport Area High School is outweighed by the Establishment Clause concerns described earlier.

First, although we have found that the students did enjoy a free speech right to engage in religious activity within the activity period, that right exists only within the context of a "limited forum." The continuation of that right is therefore at the complete discretion of the school authorities, who may abolish the activity period altogether, or limit it to strictly curricular subject matter,[29] which would not embrace the religious communication engaged in by Petros.

The opportunity for expression which would be lost if this limited forum were closed to religious speech, there-

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[28] We recognize that, in normal course, once a constitutional right has been duly established, the courts may not refuse to give it effect by rationalizing away its importance in a particular setting. We limit this analysis to the unique situation presented here, in which two constitutional provisions are in direct conflict, and thus where it is impossible to avoid deciding which of the two must control.

In undertaking this analysis, we also emphasize that we do not attempt to evaluate the *worth* of the actual activity which is protected either by the free speech clause or the Establishment Clause. Thus, in this case, the value of the ideas which Petros sought to convey through its meetings is irrelevant to our determination. Rather, all that we examine is the value and significance of the *opportunity* which the particular circumstances afford to utilize those rights, in order that we may know what amount of constitutional protection would be lost if that opportunity were sacrificed.

[29] *See* Pa. Stat. Ann. tit. 24, § 5-511 (Purdon 1962 & Supp. 1983), quoted *supra* note 6.

fore, would not be one to which the students enjoyed an absolute right of entitlement, but rather one which existed in the first place only as permitted by school officials. Moreover, the loss of that opportunity would be compensated in substantial measure by alternative means of communication which exist throughout the community. Although it cannot be said that the loss of the high school as a meeting place would not impose an inconvenience upon the students of Petros, we are not persuaded that it would impair the practical ability of such a group to conduct its activities in a meaningful way, if it is forced to do so outside of the school premises and at times other than during school hours.

Second, public schools have never been a forum for religious expression. The free speech right enjoyed by the students is therefore of a dramatically different character than the right to communicate in a traditional public forum such as a park or on a sidewalk, or through the press, where the overriding importance of allowing free expression has been deeply and firmly rooted throughout our history.

On the other hand, the Establishment Clause dangers described in Part IV above would be unavoidable, and to a large extent unremediable, if Petros were granted access to school facilities during the curricular day. We cannot escape the conclusion that such group activity, when conducted within the hours of compulsory attendance, on school premises, and under official sanction and supervision, would promote an impermissible atmosphere of religious partisanship in a public secondary school, which the Establishment Clause requires must be free of such divisiveness.

We therefore conclude that, in balancing the respective constitutional interests which would be lost and gained if Petros were granted access to the activity period, as against those which would be lost and gained if it were

not granted access, there is a greater vindication of the protections of the Constitution if the Establishment Clause prevailed in this instance, as we hold that it does. To this extent, therefore, it can be said that the interest of Williamsport in complying with its constitutional obligations provides a compelling state interest. *See Widmar*, 454 U.S. at 271. Under other circumstances, of course, this same analysis could work to override the Establishment Clause, if a sufficiently compelling interest were shown. We need not address those circumstances here, however, since the record in this case does not lend itself to such a conclusion.

VI. CONCLUSION

We are not unaware of the importance of the constitutional issues presented in this case, nor of the delicacy which resolution of this case entails. It is out of respect for that delicacy, however, that we have been cautious not to overstate the breadth of our decision.[30]

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[30] The dissent has characterized our holding as a "bright line" *per se* rule: "no prayer in public secondary schools." Dissent, typescript op. at 1, 20. If the dissent means to say that we have adopted a *per se* rule that *group* prayer activity, held *on school premises*, conducted as part of an *organized high school* activity program, at which a *school monitor* must be present, and which takes place during the hours of *compulsory school attendance*, violates the Establishment Clause, then that characterization is accurate. Without these critical qualifications, however, the dissent mischaracterizes our holding.

Because each additional fact and factor impacts so heavily upon a school prayer analysis in a determination as to whether the particular circumstances pass constitutional muster, we feel it necessary to be precise in considering the relevant facts leading to a particular conclusion. For example, *compare* H.R. 5345, 98th Cong., 2d Sess. (1984) (allowing voluntary group religious activity *before, during, and after* school hours) *with* Amendment No. 3152 to S. 1285, 98th Cong., 2d Sess. (1984) (allowing voluntary group religious activity *outside* of school hours only). Thus, while in normal course we would not comment upon the dissent's characterization, we believe it essential to correct any misperception which that characterization may occasion.

Some twenty years ago, the United States Supreme Court banned officially organized prayer and Bible readings in the public schools. *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963). Since that time, courts have been faced with repeated attempts to re-introduce prayer into the public schools under a variety of different guises. *See, e.g., Karen B. v. Treen*, 455 U.S. 913 (1982) (statute authorizing voluntary student or teacher initiated prayer at the beginning of the school day held unconstitutional); *May v. Cooperman*, 572 F. Supp. 1561 (D.N.J. 1983) (statute authorizing a one-minute period of silence at the beginning of the school day held unconstitutional).

The public schools have traditionally represented, in the words of Justice Frankfurter, "the symbol of our democracy and the most pervasive means for promoting our common destiny." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 231 (1948). They serve to instill in our children "an appreciation of critical reasoning, a commitment to democratic institutions, and a dedication to principles of fairness." *Brandon v. Board of Education*, 635 F.2d 971, 973 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). Thus, it is imperative that divisive forces be eliminated from the school environment. *See McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring), *quoted supra* p. 40.

Instead of uniting students from varying backgrounds and beliefs, prayer in the public schools segregates students along religious lines. This works to the detriment of all students, and may particularly ostracize and stigmatize those students who are atheists or adhere to religious beliefs not shared by the majority of their fellow students. The peer pressure inherent in a high school environment exaggerates the ostracism which may be experienced by nonconforming students, especially if they see student leaders or favorite teachers participating in the prayer club. *See Brandon, supra*, 635 F.2d at 978.

Accordingly, we are of the view that "Sacred practices of religious instruction and prayer, [as] the Framers [of the Constitution] foresaw, are best left to private institutions—the family and houses of worship." *Id.* at 973.

Our decision has no impact upon the rights of high school students to engage in speech protected by the first amendment which does not involve the Establishment Clause dangers present here. We only hold that the particular circumstances disclosed by this record and present at the Williamsport Area High School lead to the inexorable conclusion that the constitutional balance of interests tilts against permitting the Petros activity to be conducted within the school as a general activity program.

The judgment of the district court will be reversed.

ADAMS, *Circuit Judge*, dissenting.

Long before Lisa Bender and her fellow students formed Petros, the Williamsport Area High School had adopted its policy permitting any student group, so long as "legal and constitutionally proper," to meet during the activity period. Nothing in the record, the briefs, or the oral argument suggests that the high school sought by this policy to promote religious activity, or that a teacher or other school employee sponsored Petros, or that the activity period in any way encouraged attendance at Petros. Nonetheless, the majority holds that Petros must be excluded. Given the high school's conceded neutrality toward all student activities and the unquestioned voluntariness of an individual student's decision to attend any particular activity, the majority's conclusion essentially rests on the view that collective religious speech simply may not take place within the walls of a public secondary school without violating the Constitution.

This bright line rule—no prayer in public secondary schools—represents an easily applied interpretation of the

Establishment Clause. Were the Court today writing on a clean slate, such an approach might be understandable. But in fact we are constrained by a substantial body of Supreme Court precedent seeking to define the bounds of permissible contact between incidental religious activity and the state. While I agree that the case before us is not completely free from doubt, I cannot join the majority's conclusion that the Establishment Clause, as construed by the Supreme Court, requires exclusion of Petros solely because of the religious content of its speech. In particular, I do not believe that Petros can be meaningfully distinguished from the student religious group permitted to meet in a public university by *Widmar v. Vincent*, 454 U.S. 263 (1981). Because I cannot subscribe to the majority's wooden reading of the First Amendment, and because I believe the result reached today is at variance with controlling precedent, I respectfully dissent.

I.

Less than three years ago, the Supreme Court held in *Widmar* that a state university could not deny a student prayer group the right to meet in school facilities on the same basis as other student groups. Declaring that the university's policy of accommodating the meetings of student activities "created a forum generally open for use by student groups," 454 U.S. at 267, *Widmar* required that any content-based exclusion from that forum be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Id.* at 270.

Widmar made it clear that the Bible reading, prayer, and religious discussion of a student group were protected forms of speech no less than the discussions of the Students for a Democratic Society or the Young Socialist Alliance. *See id.* at 269 n.6, 274. Thus, before excluding the prayer group from campus, the university was required to meet the same exacting scrutiny applied to any discrimination against speech.

The university in *Widmar* proffered only one state interest for excluding all religious activity and teaching from campus: that to permit it would violate the establishment clause. The Court squarely rejected the idea that the constitution justified exclusion of a group engaging in religious speech. Applying the three-prong test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971),[1] it was determined that the requirements of a "secular purpose" and of "[non-]entanglement" were "clearly met" by a policy that accommodated the prayer group on the same basis as other student groups. *Id.* at 271.

As for the question of "primary effect," the Court relied on two factors in concluding that any benefit to religion from permitting the prayer group to meet would be "incidental": first, the fact that "an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices"; and second, that "the forum is available to a broad class of non-religious as well as religious speakers." *Id.* at 274.

The situation at Williamsport is strikingly similar to that presented in *Widmar*. As in *Widmar*, Williamsport adopted a policy permitting all student groups to meet during the activity period, and thereby created a forum generally open to student activities. Also as in *Widmar*, a group of students, on their own initiative decided to form Petros to pray, as well as read and discuss the Bible, rather than go to the French Club, the Bowling Club, the library or any number of other activities. Also,

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[1] Under the *Lemon* test, a governmental policy will not offend the Establishment Clause if it satisfies the following three requirements:

> First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster "an excessive government entanglement with religion."

Lemon, supra, 403 U.S. at 612-13.

like *Widmar*, Williamsport's activity period is open to a wide variety of interests—some 25 student clubs, in addition to a number of other non-club activities. However, unlike *Widmar*, the open forum at Williamsport is not at a public university, but at a high school.

The majority believes that the distinction between a university and high school forum is itself dispositive. To my mind, however, Williamsport still bears the burden of coming forward with a compelling state interest to support exclusion of Petros. The high school's contention that the Establishment Clause supplies such a compelling interest must be analyzed in the same manner as was the identical claim by the university in *Widmar*. Permitting Petros to meet during a generally open activities period would, in my view, clearly have a secular purpose and avoid excessive entanglement. The only difficult issue is, therefore, whether accommodation of Petros would be perceived as government endorsement of religion and would, as a result, have the primary effect of advancing religion.

Thus the pivotal question in this case is whether a small group in a high school that prays and reads the Bible is sufficiently different from a small group in a university that engages in similar activity, so as to distinguish *Widmar*. To support the conclusion that Petros must be excluded, the majority focuses primarily on the fact that high school students are less mature and more impressionable than university students.

II.

As a general matter, high school students are on the average less mature and more impressionable than college students. Nonetheless, this generalization does not end the inquiry in this case. As I read the case law governing speech rights of students in publicly-supported schools, there is no clear constitutional distinction based

on the comparative intellectual capacities of 14-18 year olds as opposed to 18-22 year olds. Particularly in this case, where the school authorities have previously determined that Williamsport students are sufficiently independent to make good use of a period open to student-initiated activities, it seems improvident for a court to forge a constitutional principle, with all the rigidity which it invariably creates, from vague impressions of the emotional sophistication of high school students.

As the Supreme Court has made clear, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 506 (1969). Thus a student

> may express his opinions even on controversial subjects . . . if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.

Id. at 572-73. This teaching has been applied by the Supreme Court to protect the right of students attending junior or senior high school students to bear armbands in protest against the Vietnam War, *see Tinker*, and the right of elementary and secondary school students not to salute the flag or pledge allegiance to it. *See West Virginia Board of Educ. v. Barnette*, 319 U.S. 624 (1943). Although the exact scope of First Amendment rights within public secondary schools is somewhat unclear in the wake of *Board of Educ. Island Trees v. Pico*, 102 S.Ct. 2799 (1982), most of the Justices conceded in that case that free speech principles bar a school board from certain content-based regulations on purchasing books for a high school library, such as the refusal, for narrowly partisan reasons, to buy books by Democrats or by Negroes. *Id.* at 2810 (Brennan, J. for plurality); 2813 (Blackmun, J. concurring); 2828-29 (Rehnquist, J. dissenting).

Undergirding decisions such as *Tinker*, *Barnette* and *Pico* is the notion that students in secondary schools are citizens-to-be and that they can, to some extent, both contribute to and learn from participation in a free exchange of views. As the Supreme Court has acknowledged, the public schools are vitally important institutions "in the preparation of individuals for participation as citizens" and for "inculcating fundamental values necessary to the maintenance of a democratic political system." *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). The *Barnette* Court reasoned that the fact that public schools

> are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

319 U.S. at 637. Thus the Court in striking down a New York law requiring that all teachers in the state's educational system certify that they were not members of the Communist party declared,

> [t]he classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (citations omitted).

Recognizing that students—especially those in high school—have the ability to participate in a marketplace of ideas, federal courts have repeatedly invoked the First Amendment to limit the authority of public officials to control the student body's exposure to views not endorsed

by the school board.[2] Thus in *James v. Bd. of Ed., supra* note 2, the Second Circuit expressly relied on the high school student's ability to distinguish between the official views of the school board and the personal opinions of a teacher as a basis for upholding a teacher's right to wear an armband in protest against the Vietnam War: "[i]t does not appear . . . that any student believed the armband to be anything more than a benign symbolic expression of the teacher's personal views." 461 F.2d at 574. As the *James* Court concluded,

> it would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play an essential role in preparing their students to think and analyze and to recognize the demagogue.

Id.[3]

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[2] *See* Russo v. Central School Dist. No. 1, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); James v. Board of Education, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972); Shanley v. Northeast Indep. School Dist., 462 F.2d 960, (5th Cir. 1972); Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.J. 1974), *aff'd mem.*, 515 F.2d 504 (2d Cir. 1975); Wilson v. Chancellor, 418 F. Supp. 1358 (D.Or. 1976); Gambino v. Fairfax City School Bd., 429 F. Supp. 731, (E.D. Va. 1977).

[3] In a similar context, Judge Rosenn has recently observed that

> the court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the later grades of secondary school.

Seyfried v. Walton, 668 F.2d 214, 219-20 (3d Cir. 1981) (Rosenn, J., concurring).

There is empirical evidence that appears to support judicial notice of the high school student's intellectual maturity. According to one commentator's survey of recent studies of adolescent psychology, adolescents, by age 14-15, gain the sophisticated cognitive capacity necessary to form their own ideas, to disagree with the views of peers and authority figures, and to establish the personal ideals and values of self-identity. *See* Note, The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools, 92 Yale L.J. 499, 507-509 (1983).

It is inconsistent to accept, on the one hand, a level of intellectual sophistication among high school students sufficient to consider and contribute to the exchange of controversial views and yet, on the other hand, to declare them incapable of discerning the distinction between a school's creation of a public forum that may permit religious speech and an endorsement of such activity. To be sure, broad generalizations about the maturity of high school students should not be erected as constitutional principle. But where, as here, the school has officially recognized that its students are sufficiently mature to benefit from two 30-minute periods per week committed to student-initiated activities,[4] and where the school's evaluation of its students' maturity is borne out by their independent decisions to participate in a wide range of activities,[5] a court may properly conclude that at least these students are capable of distinguishing the creation of a student forum from approval of the ideas expressed at any particular meetings. In the words of *Widmar*, I "doubt students could draw any *reasonable* inference of [school] support from the mere fact of a campus meeting place." 454 U.S. at 274 n. 14.

In discussing the existence of a generally open forum at Williamsport, the majority acknowledges the significance of the school's open access policy. It properly notes that the policy "encourages students to exercise independent judgment," Maj. Op. at 25, and represents an institutional commitment to

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[4] Williamsport's principal made it clear that the school's policy is to permit any student organization deemed "legal and proper." *See Bender, supra*, 563 F. Supp. at 706.

[5] When this case arose, over 25 student activities were formally recognized and functioning at the school. *Bender, supra*, 563 F. Supp. at 706. In past years, some 15 other clubs had been organized and could be re-activiated. App. at 367.

> a forum for self-expression, by which students exercise their own discretion in deciding which organization, if any, to support.

Maj. Op. at 24.[6] Having recognized that Williamsport's activity period presupposes a certain independence of intellect on the part of the students, the majority appears to be inconsistent in holding that Williamsport's students are not sufficiently mature to understand the policy behind the creation of a neutral forum for all groups, including Petros.

To the extent the majority is concerned about impressionability of high school students, they are required to consider that the exclusion of Petros will introduce content-based restrictions in an otherwise open forum that may in fact be understood as a manifestation of official hostility towards religion. It is well settled that the First Amendment proscribes governmental hostility towards religion, as well as governmental promotion of religion. *See Lynch v. Donnelly*, 104 S.Ct. 1355, 1368 (1984) ("a government practice [must] not have the effect of communicating a message of government endorsement or disapproval of religion") (O'Connor, J., concurring); *Committee for Public Educ. v. Regan*, 444 U.S. 646, 653 (1980); *Lemon, supra*, 403 U.S. at 612. When this Court sustains Williamsport's decision not to permit meetings by Petros, it sanctions a policy singling out a religious group as the only student activity ever to be excluded in the high school's history. In light of its view of the

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[6] Indeed, unlike compulsory instructional classes, which are created and designed by the school authorities, the very existence of such organizations depends entirely upon voluntary student participation and interest.

Unlike the case of prisons or military bases, the exercise of this qualified freedom to participate in the group of one's choice is quite consistent with the special purpose for which the high school is intended—the preparation of youth for adult life and adu't decisions.

maturity of high school students, the majority it seems to me, is obligated to explain why such a selective exclusion does not raise First Amendment problems of perceived government disapproval of religion.[7]

III.

Putting to one side the majority's position that the intellectual development of the high school student is sufficient cause for excluding Petros, in my view the other factors cited by the majority to distinguish *Widmar* are, at least in the context of the Williamsport activity period, not persuasive.

A.

Seeking to bolster its conclusion that permitting Petros to meet will have a primary effect of advancing religion, the majority points to three institutional distinctions between the high school and the university: (1) that high school's students are compelled to attend by the state's truancy laws; (2) that a high school needs an adult monitor to insure discipline; and (3) that a high school building is physically more confining than a college campus. The predicted effect of these institutional differences—that the presence of Petros will be perceived as state endorsement of religion—represents uncorroborated speculation without any basis in the record. Inasmuch as *Widmar* commands that the state produce evidence of a compelling interest to justify a content-based exclusion from a generally open forum, the majority's reliance on these three distinguishing factors appears misplaced.

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[7] *See* Civil Liberties Union v. Lubbock Indep. School Dist., 680 F.2d 424, 426 (1982) (Reavley, J., dissenting from denial of rehearing en banc) ("We should not forget, however, that the young student may also be given the impression that our government and the courts and the schools are hostile to all religious belief and practice. I would consider that a very great wrong to the children, to the Constitution, and to our nation.").

It is true that under Pennsylvania law, school attendance is compulsory until age seventeen.[8] But in view of the voluntariness of a student's decision to attend a specific activity, the fact of compulsory attendance is irrevelant. As the majority observes, "the very existence of [the clubs] depends entirely upon voluntary student participation and interest." Maj. Op. at 24; *see also* Maj. Op. at 10 ("Participation in activities is completely voluntary"). The coercive power of the state in no way favors a student's decision to select any particular activity. So long as a student is recorded as present somewhere in the school building, whether he or she chooses to stay in the homeroom, study in the library, work at the computer station, or attend any one of the more than 25 student clubs is of no concern to the school authorities. Especially when the student is presented with such a wide range of options, and when attendance at any one of those activities requires the student's affirmative movement away from the homeroom, I do not see how it can be suggested that attendance at Petros is compulsory in any sense that is troublesome under the Establishment Clause.

The majority's concern that the presence of an adult monitor at Petros meetings would create an impression of official endorsement is similarly not justified by the record.[9] According to the affidavits, the faculty monitor

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[8] 24 Pa. Stat. Ann. §§ 13-1326, 13-1327 (1983). High school students generally reach their seventeenth birthday sometime during their junior year. Thus at a four-year high school like Williamsport, a significant number of the students are not subject to compulsory attendance laws.

[9] Nor does the mere presence of an adult monitor approach the level of state sponsorship found in Abington School District v. Schempp, 374 U.S. 203 (1963) or Engel v. Vitale, 370 U.S. 421 (1962). In *Schempp*, which involved the required daily reading from the Bible in public school, and *Engel*, which concerned the required recitation of a daily prayer, the state effectively mandated

at the first meeting of Petros did not in any way participate in the meeting. The monitor took attendance, then spent the remaining time grading papers. App. at 227-28, 401-02. In their complaint, the students specified that the faculty advisor would be present "solely for purposes of ensuring good order and not for any purpose related to the religious content of the meetings." App. at 20 (Complaint ¶ 57 (C)). Moreover, before the district court the students offered to withdraw the request for an advisor, for any purpose. *See Bender*, *supra*, 563 F. Supp. at 715. Nonetheless, out of an abundance of caution, I would, if I were in the majority, require that Petros meetings be monitored by a non-teacher.[10] Having taken this extra measure of protection, I see no possibility that the monitor's presence—"only to ensure orderly meetings," *id.* at 715—could be misconstrued as school endorsement of Petros.

The majority's other suggestion—that the small size of a high school campus increases the visibility of a group such as Petros—is also pure conjecture. Although *Widmar* never intimated that the constitutionality of an equal access policy depends on the visibility of a group, the Court there did note that some prayer group meetings were held in the student center, 454 U.S. at 265 n. 2, a location that is generally highly visible in a university community. By contrast, the affidavits here indicate that Petros was assigned to meet in the school cafeteria, App. at 228, a location that is typically *not* in use at the beginning of a high school day. Given that 2,500 students attend Williamsport High School (more than at the campuses of some state colleges), and that 20 to 45 students

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a particular religious practice. Also, since the classroom context was such that excusal was likely to cause embarrassment, the state commandment of religious activity affected all students.

[10] School policy does not require that a faculty member serve as advisor to a club. The adult monitor may be another school employee or a parent. App. at 404.

attended Petros, it seems particularly speculative for the majority to suggest that "students of differing or conflicting creeds would . . . be less able to overlook" Petros than would be the case in a university campus. Maj. Op. at 35. Absent some evidence bearing on Petros' visibility, the majority's reliance on this factor would appear to be inappropriate to the resolution of a constitutional issue as weighty as the one before us.

B.

Besides distinguishing the high school from the university, the majority also looks to the distinction between permitting religious activity within a school building, rather than away from school premises. The majority seeks support from *Illinois ex rel. McCollum v. Bd. of Ed.*, 333 U.S. 203 (1948), and *Zorach v. Clauson*, 343 U.S. 306 (1952), for the proposition that accommodating *any* religious activity in a public school building will convey an impermissible message of government endorsement. In my view, this reading of *Zorach* and *McCollum*, while perhaps helpful in explaining the somewhat inconsistent results of those two decisions, is of little assistance outside their setting of school-sponsored religious activity.

Both *Zorach* and *McCollum* address the validity of "excused time" programs under which students were permitted to receive religious instruction from denominational church groups during regular school hours. The main factual difference between the two programs is that in *Zorach* students left the school building for their instruction, while in *McCollum* they stayed in the classroom. Focusing on the fact that in these two excused time cases only the *McCollum* arrangement was struck down, the majority suggests that in the case before us the Establishment Clause boundary should likewise be set at the walls of the school facility. This attempt to extend *Zorach* and *McCollum* is, I believe, misguided because

those cases so clearly raised the spector of government-endorsed and even government-coerced religious activity. As the *McCollum* Court noted, students were released from their legal duty of education within the secular curriculum "upon the condition that they attend the religious classes." 333 U.S. at 209. Indeed, the *Widmar* Court emphasized the peculiar problem of government sponsorship inherent in a released time period established solely for religious activity:

> Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. *See, e.g., McCollum v. Board of Education*, 333 U.S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

454 U.S. at 272 n. 10. Thus, notwithstanding any suggestion of *McCollum* and *Zorach* to the contrary, *Widmar* makes clear that equal access of a prayer group in a generally open forum, even within a school building, does not itself constitute official promotion of religion. Moreover, in *McCollum* the school officials met with several church representatives and worked in "close cooperation" in promoting the religious program. 333 U.S. at 209. That is clearly not the case here.

C.

Conceding that the case could be decided on the basis of the "primary effect" test alone, the majority nevertheless goes on to argue that permitting meetings by Petros would violate the "excessive entanglement" test as well. The majority suggests that an "intimate and continuing relationship" between Petros and the school would develop from the necessity of "constantly . . . interpret-[ing]" Petros announcements to insure that no "reli-

giously oriented material" would be communicated on the bulletin board, the public address system, or the school newspaper. Maj. Op. at 44-45. I believe this suggestion of entanglement rests on a misperception of the facts.

To eliminate any possible entanglement, the students of Petros agreed to forego completely the use of the bulletin board, the public address system, the school newspaper and the yearbook. *Bender, supra*, 563 F. Supp. at 713-14. As I understand the record, the students' proposal represents a simple, easily-administered rule: the Petros club shall not use any school media. I cannot see how this rule would require the sort of policing the majority fears. Thus, to my mind, the entanglement problem here should be analyzed as in *Widmar*, which concluded that the school "would risk greater 'entanglement' by attempting to enforce its *exclusion* of 'religious worship' and 'religious speech.'" 454 U.S. at 272 n. 11 (emphasis added).

The majority's attenuated notion of entanglement is, moreover, without support in the historic purposes of the Establishment Clause. The concept of excessive entanglement announced by the Supreme Court for the first time in *Walz v. The Tax Commission*, 397 U.S. 664 (1970), is focused on whether a law or governmental practice engenders excessive involvement between church and state. The question is whether the statute or regulation at issue unduly interferes with religious activities, on the one hand, or contemplates continuing governmental surveillance of religious groups or institutions, on the other hand. In *Walz*, Chief Justice Burger noted that if churches and other religious institutions were not exempt from property taxes there would be excessive and indeed continuous entanglement when the tax collectors went to each church facility and examined it to determine the amount of assessment. Indeed, Justice Brennan in his concurring opinion did note that the termination of ex-

emptions would give rise to tax liens, foreclosures and the direct confrontation and conflicts that follow in the train of such legal processes. *Id.* p. 691.

Justice Harlan, also concurring in *Walz*, added that the concept of excessive entanglement encompasses direct governmental involvement which engenders a risk of politicizing religion. "What is at stake as a matter of policy," he asserted, "is preventing that kind and degree of government involvement in religious life that . . . is apt to lead to strife and frequently strain a political system to the breaking point." *Id.* 694. According to Justice Harlan, the theory embraces two prohibitions: excessive administrative involvement and political divisiveness.

In the very next case dealing with the subject, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Chief Justice Burger emphasized that under the legislation then under consideration (direct financial aid to parochial schools), it would be necessary for public officials continuously to check on the teachers and what they were teaching, the text books that were being used, and the various school budgets to make certain that the parochial schools did not have a higher per pupil expenditure than the public schools. In addition, along the same lines pointed by Justice Harlan in *Walz*, the Court in *Lemon* was concerned about successive annual appropriations that would undoubtedly create political divisiveness.

The elements present in *Walz* and *Lemon* are a far cry from those present in the *Williamsport* situation.[11]

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[11] While there is precious little evidence supporting the conclusion that there was excessive entanglement here, it is also worth noting that the Supreme Court apparently has begun to question the reach of the excessive entanglement approach. *See, e.g.*, Lynch v. Donnelly, 104 S.Ct. 1355, 1364-65 (1984) (Burger, C.J.); *id.* at 1367 (O'Connor, J., concurring).

IV.

In considering the larger implications of the present dispute, it is critical not to lose sight of the distinctions between this case and others involving religious activity in a secondary school. This is not a case like *Engel v. Vitale* or *Abington v. Schempp* in which the state was commanding every student to participate in a prayer or Bible reading exercise, in a setting where excusal might well embarrass the student. Nor is this case like *McCollum*, where the school authorities set aside a time dedicated to religious instruction. Here, by contrast, the religious activity is not traceable to any state law or school regulation. Rather, a small group of high school students wishes to gather on a purely voluntary basis to read the Bible and to pray. They seek to do this while their classmates are attending French Club, or Ski Club, or Drama Club. To deny these students the right to meet on the same basis as their fellow students is to ignore the fundamental differences between self-initiated and state-sponsored religious activity.

Perhaps the majority's concern stems not from the prospect of establishment of religion by the presence on the campus of Petros, but from the possibility of unconstitutional extensions of the Williamsport arrangement elsewhere. Motivated, for example, by the desire to promote religion, a school board might create a student activities period that in fact amounts to no more than a prayer period. Given the emotion surrounding the school prayer issue, the majority's apparent concern with extensions of the Williamsport case is perhaps understandable. I would first point out, however, that the clearly unconstitutional cases are different from the one before us, and can be dealt with as they arise. I would then suggest that we openly confront the dilemma of Establishment Clause adjudication that underlies these school prayer cases.

On the one hand, we can eliminate all uncertainty by adopting the *per se* rule implicitly used by the majority

today; no prayer shall be permitted in public secondary schools. The clarity of that approach has its advantages. But on the other hand, we can continue to engage in the delicate task of balancing two distinct First Amendment interests. The presence of any religious activity in the public schools does evoke some concern regarding mandatory school prayer. At the same time, content-based restrictions on access to an open forum by state actors strikes at the heart of competing First Amendment values. *See Consolidated Edison v. Public Service Comm.*, 447 U.S. 530, 537 (1980). Admittedly, sifting between these considerations on a case-by-case basis involves a considerably more difficult adjudicative task than a *per se* rule.

Nonetheless, on balance I am persuaded that the purposes of the First Amendment are better served by rejecting a *per se* rule, even in cases involving religion and the school. One of the great triumphs of America's constitutional experiment has been the avoidance of religious factionalism in the political sphere. Our country's continued progress in this endeavor ultimately depends on the individual citizen's tolerance and respect for religious diversity. When the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, I believe the Constitution and the Nation are the better for it. At Williamsport, I believe that allowing Petros access to an open forum that has been created for no improper purpose falls on the permissible side of the First Amendment dividing line. Accordingly, I must respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-3284

LISA BENDER; MORRIS BRAGGS, A Minor, By MRS. MARY BRAGGS, His Guardian ad Litem; TONI ROBB; ROBIN KRINER; KERRY HUNTER, A Minor, By MR. & MRS. CARL HUNTER, Her Guardians ad Litem; BRENDA KAY HERZOG, A Minor, By MR. & MRS. LOUIS HERZOG, Her Guardians ad Litem; SHAWN SEEVERS, A Minor, By MR. & MRS. GERALD SEEVERS, His Guardians ad Litem; PETER STRAYER, A Minor, By MR. & MRS. CHARLES STRAYER, His Guardians ad Litem; BRUCE BROSSMAN, A Minor, By MR. & MRS. BRUCE BROSSMAN, His Guardians ad Litem; and DENISE MARSHALL, A Minor, By MR. & MRS. DENNIS MARSHALL, Her Guardians ad Litem, and all others similarly situated,

Appellees

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT; OSCAR KNADE, Superintendent of the Williamsport Area School District; RICHARD F. EBERHART, President of the Williamsport Area School Board; JANET C. HARRIS, Member of the Williamsport Area School Board; G. KENT BITNER, Member of the Williamsport Area School Board; ARTHUR E. DUNCAN, Member of the Williamsport Area School Board; JOYCE S. HERSHBERGER, Member of the Williamsport Area School Board; RICHARD L. MERK, Member of the Williamsport Area School Board; GENE SMITH, Member of the Williamsport Area School Board; KERMIT SMITH, Member of the Williamsport Area School Board; JOHN C. YOUNGMAN, JR., Member of the Williamsport Area School Board; and WAYNE A. NEWTON, Principal of the Williamsport Area High School,

Appellants

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges* and BROTMAN, *District Judge* *.

ORDER

It is

ORDERED that the order denying rehearing be amended to read as follows:

> "The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.
>
> Judges Gibbons and Weis would grant the petition for rehearing."

By the Court

/s/ Leonard I. Garth
Circuit Judge

DATED: August 15, 1984

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* Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 82-0692 CIVIL

LISA BENDER, *et al.*,

Plaintiffs

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,

Defendants

[Filed May 12, 1983]

OPINION AND ORDER

This case involves an interesting, yet difficult and volatile area of constitutional law. The Williamsport Area School District has adopted a policy establishing a regularly-scheduled activity period to encourage students to organize clubs and groups and hold meetings at its high school. The plaintiffs herein requested permission to form a club which would use the period to read scriptures, pray, discuss religious questions and engage in "other activities . . . of interest to the group." The request was denied. No student group or organization previously has been denied the opportunity to participate in the activity period. The specific question for resolution then, is whether *under the precise facts presented*, this wholly student-initiated prayer club may meet during the activity period.

At the outset, it is necessary to emphasize what this case does *not* involve lest there be a mistake about the scope of the court's holding. This is not a case where school administrators have adopted a rule or policy re-

quiring, or even allowing, students to meet for religious purposes. This is not a case where a school teacher or other school official has adopted a practice of requiring or encouraging school prayer or other religious discussion in his classroom. It is not a case where a teacher or other school official encouraged or counselled the students to request the opportunity to meet during the activity period. It is not a case where the students represent a particular religious denomination. Rather, in this case, a number of students, acting voluntarily and free of outside influences, have requested permission to form a club and meet during the school's activity period on the same basis as other student organizations. The request was denied on the sole ground that the students wish to engage in religious speech. This decision was not based upon a judgment regarding curricular choices or concerns of discipline and order. It was based solely upon the belief that the school board cannot exercise power to grant the request without contravening the United States Constitution.

The case implicates a constitutional conflict of the highest order. The plaintiffs assert a constitutional right as the basis of their claim. The defendants assert a constitutional limitation as the basis of their defense. The students argue that the "First Amendment" requires the school to grant them the permission they seek. The school district argues that the "First Amendment" bars it from granting such permission.

The First Amendment concerns implicated in this case are embodied in three discrete clauses of that constitutional provision. The plaintiffs invoke the Free Speech and Free Exercise clauses to support the proposition that they have a "right to pray" under the facts of this case. The defendants raise the Establishment Clause as a defense, arguing that it stands as a constitutional bar to the relief sought. Many courts have recognized that there is a certain amount of "tension" betwen the two

religion clauses of the Constitution. *See, e.g., Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 719 (1981). At least part of the blame for this inconsistency has been placed upon an "overly expansive interpretation" of these provisions. *Id.* at 721 (Rehnquist, J., dissenting).[1] It appears that the strongest criticism has been reserved for the Supreme Court's liberal construction of the Establishment Clause, which relies, *inter alia*, upon the metaphor of an unyielding wall erected to separate church and state. *See, e.g., Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d 514, 522 (3d Cir.) (Weis, J., concurring), *aff'd*, 442 U.S. 907 (1979).[2] In addition, Establishment Clause cases have been criticized because they fail to provide "a principled and logical thread" for the resolution of future cases. 590 F.2d at 521 (Weis, J., concurring).

There may be merit to these arguments. Nevertheless, this court is bound by, and must work with, the guidance given to it by appellate decisions. While the precedents in this area are not the easiest to reconcile and to apply to given facts, they are precedents nonetheless, and will be treated accordingly. This court has neither the power nor the inclination to depart from binding authorities whether it be by express statement or by a holding which fails to conform to prior cases in a logical and objective fashion. Knowing of the strongly held views on this subject, I venture into the thicket with some apprehension.

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[1] *See, also* President's Message to Congress, May 17, 1982, H.Doc. No. 97-180, *reprinted in* [1982] U.S. Code Cong. & Ad. News D45, D45-46 (proposing "voluntary prayer" amendment to Constitution).

[2] "So often a wall implies fear and hostility, as the infamous structure separating East and West Berlin so dramatically demonstrates. No such emotions should dominate the relationship between government and religion and the use of a metaphor that encourages such concepts is not desirable." Public Funds for Public Schools of New Jersey v. Byrne, 590 F.2d 514, 522 (3d Cir.) (Weis, J., concurring), *aff'd*, 442 U.S. 907 (1979).

Presently before the court are the parties' cross-motions for summary judgment. While there appears to be a factual dispute between the parties, it is not of sufficient importance to preclude the entry of summary judgment. *See* note 4 *infra*. Indeed, the parties agree that no genuine issue of *material* fact remains. Although the case presents only a question of law, this is not to say that the facts are unimportant. On the contrary, the undisputed facts are of paramount importance to the resolution of the legal question presented in this case. A slight change in the facts could very well have dictated a contrary decision.

After carefully reviewing those facts, and after giving full consideration to all pertinent legal authority, the court concludes that because the defendant school district is not constitutionally required to deny the plaintiffs the opportunity to meet, by doing so solely on constitutional grounds it has impermissibly burdened their free-speech rights. Accordingly, summary judgment will be granted in favor of the plaintiffs. The discussion set forth below outlines the reasons for this decision.

FACTS

The events which led to the filing of this action began in September, 1981 when several of the plaintiffs,[3] including Lisa Bender, Morris Braggs and Kerri Hunter, met with Wayne Newton, Principal of the Williamsport Area High School and a defendant herein. The students

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[3] Six of the plaintiffs, *viz.*, Lisa Bender, Morris Braggs, Tony Robb, Robin Kriner, Kerri Hunter and Brenda Kay Herzog, have been graduated from the Williamsport Area High School since this action was instituted and, therefore, no longer have standing to seek injunctive relief. This action remains "a case or controversy," however, as four of the plaintiffs are still students at the high school.

requested permission to form a club[4] which would meet during the school's activity period.[5] Permission was

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[4] A review of the record in this case reveals a conflict in the testimony on whether Mr. Newton knew the purpose of the proposed club when he first granted permission for it to meet. The affidavit of Lisa Bender states:

> [W]e requested permission to form a club to hold meetings during the regularly scheduled activity period, at which time there would be prayer and Bible reading. Mr. Newton told us to go ahead and meet because other students had done so in previous years and he did not believe that there would be any problems. He did, however, inform us that we could not advertise our meetings either by announcing or by posting announcements on bulletin boards.

Affidavit of Lisa Bender, Document 15 of the Record, at pp. 1-2.

In contrast, Mr. Newton testified at his deposition as follows:

> Their original request was not very clear to me. Originally, they were saying that they wanted to meet as a group of students and my question to them was for what purpose and they more or less left me with the belief that they had to meet as a group before they could give me their purpose. I did permit, more or less, an organizational-type meeting for these students to meet so they could tell me what they were going to do. When they made known to me what they were going to do, at that point I had to, in my opinion, say no at that point because of the literature I have read with regard to prior-type groups meeting on school time.

Deposition of Wayne A. Newton, Document 16 of the Record, at p. 18.

While it is true that a court may not resolve disputed factual issues on a motion for summary judgment, the factual dispute outlined above does not prevent summary judgment in this case because it is not material to the reasoning employed by the court.

[5] The activity period is a regularly scheduled part of the school day which occurs between 7:57 a.m. and 8:27 a.m., usually on Tuesday and Thursday of each week. During this period various club meetings and activities take place. Affidavit of Wayne E. Newton, Document 21 of the Record at 2-3. According to Mr. Newton: "Activities and clubs which promote the intellectual, physical and social development of students have been approved as officially sanctioned student activities, permitted to meet during the school day,

granted and the club met during the first activity period thereafter with approximately forty-five students and a teacher acting as monitor in attendance.

After the initial meeting of the club, Mr. Newton informed the students that they could not meet further until he discussed the matter with Dr. Oscar Knade, Superintendent of the Williamsport Area School District. On October 1, 1981, the students sent a letter to Dr. Knade concerning their desire to form a voluntary nondenominational group "to read some scriptures and pray to God that he might edify [their] minds." By letter dated October 21, Dr. Knade requested further information on the proposed activity and told the students that he would discuss the matter with them after he received a legal opinion from the School District's Solicitor on the propriety of such an activity on school premises. Thereafter, the students sent the following "Proposal For a New Student Organization" to Dr. Knade:

> NAME OF THE ORGANIZATION
>
> Petros (The Rock)
>
> NATURE OF THE ORGANIZATION
>
> The Organization will be a nondenominational prayer fellowship.
> Participation will be voluntary and open to all students.

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i.e., the activity period, permitted to use school facilities and with a faculty advisor or monitor assigned to it." *Id.* at 3. *See also* discussion *infra*. Each student club is given use of a bulletin board which may be used for announcements and displays. Additionally, clubs are granted access to the school's public address system. There is no requirement that either the bulletin board or the public address system must be used. The school has an unwritten policy requiring an advisor for each club. *See* Document 25 of the Record.

PURPOSE OF THE ORGANIZATION

The purpose of the organization will be to promote spiritual growth and positive attitudes in the lives of its members.

LEADERSHIP

Selection of leaders will be by democratic election. The leaders will be responsible for directing the meetings and co-ordinating activities in a manner that will carry out the purpose of the organization.

MEETINGS

Regular meetings of the organization will be held on school premises during the Tuesday and Thursday morning activity periods. They will include scripture reading, discussion, prayer and other activities which may be of interest to the group.

SUPERVISION

Meetings of the organization will be supervised by a faculty advisor. Student attendance may be verified by the signing of a roster.

Exhibit 3 to Document 8 of the Record.

On November 16, 1981, Mr. Newton and Dr. Knade met with representatives of the proposed group. The students were told that based on the Solicitor's legal opinion, their request must be denied. Dr. Knade and Mr. Newton then discussed with the students an alternative whereby the club could meet off school property. The defendants indicated that if the students secured a location and an adult supervisor, preferably a clergyman, they would be given released time during the activity period. The students said they would explore this alternative.

Thereafter, the students sent a letter to the Chairman of the Williamsport Area School Board appealing the Superintendent's decision to deny them recognition and requesting approval of their club by the School Board. At a meeting held January 19, 1982, the Board affirmed the Superintendent's action and denied the appeal on the basis of the Solicitor's opinion. *See* Exhibit 5 to Document 15 of the Record. The students were notified of the Board's decision by letter dated January 21, 1982.

The students subsequently instituted this action alleging that the defendants' refusal to recognize "Petros" and allow it to meet on the same basis as other student groups solely because of its religious nature violated their civil rights. Specifically, plaintiffs claim that the defendants' action constitutes violations of the Freedom of Speech, Freedom of Religion and Establishment Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. The defendants' answer to these claims is that their actions were proper inasmuch as to allow a group such as "Petros" to meet on public school premises would violate the First Amendment's Establishment Clause.

FREE EXERCISE

The First Amendment's Free Exercise Clause proscribes governmental regulation of religious beliefs. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). This proscription reaches both the compulsion of a certain belief, *Torcaso v. Watkins*, 367 U.S. 488 (1961), and the imposition of a penalty for a belief, *Fowler v. Rhode Island*, 345 U.S. 67 (1953). *See Sherbert v. Verner*, 374 U.S. 398, 402 (1963). Plaintiffs herein argue that by denying them the opportunity to meet on the same basis as other student groups, the School District has penalized them for their religious belief and, thus, run afoul of the Free Exercise Clause.

A free exercise claim involves a two-tiered analysis. First, the individual must show that the state has either

"condition[ed] receipt of an important benefit upon conduct proscribed by a religious faith" or "deni[ed] such a benefit because of conduct mandated by religious belief," *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 717-18 (1981). *See McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *School District of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963); *Sherbert v. Verner*, 374 U.S. at 403-04.[6] Once the coercive effect of the state's action is shown, that action will pass constitutional muster only if the state can demonstrate a compelling interest and that less restrictive means are not available to serve that interest. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. at 407-09.

In *McDaniel v. Paty*, 435 U.S. 618 (1978), the Supreme Court struck down a Tennessee statute barring ministers or priests from serving as delegates to the State's constitutional convention as violative of the Free Exercise Clause. Writing for the plurality, Chief Justice Burger reasoned that the Free Exercise Clause "encompasses the right to preach, proselyte and perform other similar religious functions," *id.* at 626, and that Tennessee law acknowledged "the right of its adult citizens generally to seek and hold office as legislators or delegates to the state constitutional convention." *Id.* However,:

> under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously because the state has conditioned the exercise of one on the surrender of the other. Or, in James Madison's

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[6] In analyzing the coercive effect of the state's enactment on the practice of religion, the court does not determine the sincerity of a religious belief. Rather, the court should "inquire into the relative importance of a particular religious ritual and the degree to which exercise of that practice is infringed by government action." Brandon v. Board of Education of the Guilderland Central School District, 635 F.2d 971, 976 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

> words, the State is 'punishing a religious profession with the privation of a civil right. . . .' In so doing, Tennessee has encroached upon McDonald's right to the free exercise of religion. 'To condition the availability of benefits including access to the ballot upon this appellant's willingness to violate a cardinal principle of his religious faith by surrendering his religiously impelled ministry effectively penalizes the free exercise of his constitutional liberties.'

Id. (citations omitted). *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972) (compulsory education law requiring attendance through age sixteen violated free exercise rights of Amish whose religion requires its members to minimize contact with world influences by discontinuing formal education after eighth grade).

Similarly, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court held unconstitutional South Carolina's denial of unemployment compensation benefits to a Seventh Day Adventist because of her religious objection to Saturday work. The ineligibility for benefits "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* at 404. *See Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981) (denial of unemployment compensation to claimant who terminated his job because his religious belief forbade participation in production of armaments violated free exercise clause).

In each of the above cases, the individuals were forced to either neglect their religious beliefs or forfeit a state benefit. No such situation exists in the present case. "While school attendance is compelled for several hours per day, five days per week, the students, presumably

living at home, are free to worship together as they please before and after the school day and on weekends in a church or any other suitable place." *Brandon v. Board of Education, supra,* 635 F.2d at 977 (citing *Stein v. Oshinsky,* 348 F.2d 999, 1001 (2d Cir.), *cert. denied,* 382 U.S. 957 (1965); *School District of Abington Township v. Schempp,* 374 U.S. 203, 299 (1963) (Brennan, J., concurring)); *see Pinsker v. Joint District No. 28J,* 554 F. Supp. 1049 (D.Colo. 1983); *cf. Chess v. Widmar,* 635 F.2d 1310, 1320 (8th Cir. 1980) (prayer at public university must be allowed because students both study and live there and may be unable to hold meetings off campus), *aff'd sub nom., Widmar v. Vincent,* 454 U.S. 263 (1981). *See generally School District of Abington Township v. Schempp, supra,* 374 U.S. at 296-97 (Brennan, J., concurring) (free exercise rights would be abrogated if religious activity on military base or prison were prohibited).

Inasmuch as the school district's refusal to let the plaintiffs meet during the activity period does not force them to forego their religious belief in group worship, the plaintiffs' free exercise rights have not been violated. *Accord, Brandon v. Board of Education, supra,* 635 F.2d at 977-78; *Johnson v. Huntington Beach Union High School District,* 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied,* 434 U.S. 877 (1977); *cf. Pinsker v. Joint District No. 28J, supra,* 554 F. Supp. at 1051-52. Moreover, the court would note that to the extent, if any, the plaintiffs' belief in group worship should have been accommodated by the school district, the school's offer to allow the students to meet off school grounds during the activities period represents an attempt at such accommodation.[7] *Cf. Zorach v. Clauson,* 343 U.S. 306 (1952).

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[7] The record does not indicate why the plaintiffs rejected this offer.

FREE SPEECH

Local school boards have broad discretion in the management of school affairs. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 402 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). It is clear, however, that this discretion "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Board of Education, Island Trees Union Free School District v. Pico*, 102 S.Ct. 2799, 2806 (1982); *see Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *West Virginia v. Barnette*, 319 U.S. 624 (1943). As the Supreme Court has recently reiterated: "Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual. . . ." *Board of Education, Island Trees Union Free School District v. Pico, supra*, 102 S. Ct. at 2807 (quoting *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943)). Thus, students do not "shed their rights to freedom of speech or expression at the school-house gate." *Tinker v. Des Moines School District, supra*, 393 U.S. at 506. "They are possessed of fundamental rights which the state must respect. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 511. In the instant case, the court must determine whether these students' First Amendment right to freedom of speech, applied "in light of the special characteristics of the school environment," *id.* at 506, has been abridged by the school district's denial of recognition to Petros and refusal to allow it to meet on the same basis as other groups.

The plaintiffs argue that the Williamsport Area High School's activity period is a "public forum" created by the school. When the government seeks to restrict expression in such a forum, it bears the heavy burden of demonstrating that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar v. Vincent*, 454 U.S. at 270; *see, e.g., City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972). *See generally Grayned v. City of Rockford*, 408 U.S. 104, 115-19 (1972). The plaintiffs maintain that the exclusion of religious discussion from the "public" activities hour constitutes content-based discrimination which can be justified only by a compelling state interest. The defendants counter that the school is not a public forum and, therefore, they have the power to exclude discussion of a particular subject.[8]

It is axiomatic that the First Amendment's guarantee of free speech denies government the power "to restrict

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[8] It is now settled that religious speech is entitled to constitutional protection. *See* Widmar v. Vincent, 454 U.S. at 269. As recently stated by Justice Brennan:

> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection . . . . The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife does not place religious discussion, association or political participation in a status less preferred than rights of discussion, association, and political participation generally.

McDaniel v. Paty, 435 U.S. 618, 640 (Brennan, J., concurring) (citations omitted).

Moreover, any argument that religious worship and prayer, as distinguished from discussions about religious matters, is not speech protected by the First Amendment must fail. Widmar v. Vincent, 454 U.S. at 269 n.6.

expression because of its message, its ideas, its subject matter, or its content." *Police Department of the City of Chicago v. Mosley*, 408 U.S. at 95-96. Accordingly, the prohibition against content-based discrimination applies whether the "forum" can be denominated as "public," *see, e.g., id.*; *Widmar v. Vincent*, 454 U.S. at 269-70, or "non-public," *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7 (1981); *Greer v. Spock*, 424 U.S. 828, 840 (1976). When a "non-public" forum is involved, however, the content-neutrality test may be satisfied if there is no discrimination among viewpoints on a given subject even though there is discrimination against a particular subject. *See, e.g., Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 103 S.Ct. 948, 957 (1983); *Greer v. Spock*, 424 U.S. at 838 & n.10; L. Tribe, American Constitutional Law § 12-21 at 691 n.12; *see also Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). Absent a compelling state interest, the government has no right to predicate access to a "public" forum upon the subject matter of the speech or the status of the speaker. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 103 S.Ct. at 957.

A central principle of this doctrine is that a given parcel of government property will not be considered a true public forum "where the full exercise of First Amendment rights would be inconsistent with 'the special interests of a government in overseeing the use of its property.'" *International Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Authority*, 691 F.2d 155, 160 (3d Cir. 1982) (citation omitted); *see, e.g., United States Postal Service v. Council of Greenburg Civic Ass'ns*, 453 U.S. at 128-32 (mailbox not a public forum); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 (1977) (prison not a public forum); *Grayned v. City of Rockford*, 408 U.S. at 116 (public library not a public forum as to loud behavior); *Brown v. Louisiana*, 383 U.S. 131, 139 (1966) (public library is a public forum as to silent vigil); *American*

Future Systems, Inc. v. Pennsylvania State University, 618 F.2d 252, 256-57 (3d Cir. 1980) (university dormitory not a public forum as to commercial sales meetings). Thus, it is clear that the mere fact that the government owns a piece of property is not dispositive of the question whether the property is a "forum" for public use. *United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. at 129. "The primary factor in determining whether [the] property . . . is a public forum is how the locale is used." *International Soc'y for Krishna Consciousness v. New Jersey Sports and Exposition Authority*, 691 F.2d at 160; *see Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975); *Grayned v. City of Rockford*, 408 U.S. at 116. Places which traditionally have been dedicated to public assembly and debate are considered public forums. The classic examples are streets, parks and sidewalks. *See, e.g., Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

A third category of public property is the "limited" public forum. Not being traditionally used as a forum for the public, the "limited" public forum gains its status from the government's decision to allow the property to be used for expressive activity. *See, e.g., Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 103 S.Ct. at 955; *Widmar v. Vincent*, 454 U.S. at 267 & n.5. The government generally will be permitted to impose restrictions on the use of a limited forum if they are necessitated by the purpose for which the forum was created. Indeed, the scope of permissible limitations appears to be defined by the government's purpose in creating the forum. By the same token, however, the government will be required to satisfy the elements of "compelling state interest" scrutiny if the limitations placed upon the use of the forum are not necessitated by the nature and purpose of the forum.

For example, a university which accommodates student organizations by making its facilities "generally open" for their meetings will have created a "limited" public forum. The forum is limited by the nature and purpose of the university's action. Therefore, the university need not fear that its decision will throw its doors open for use by the general public. *See, e.g., Widmar v. Vincent*, 454 U.S. at 267-68 n.5; *cf. American Future Systems, Inc. v. Pennsylvania State University*, 618 F.2d at 256-57 (university opening dormitories for use by students need not allow corporation to hold sales meetings with students). It is clear that the nature of the forum is such that "outsiders" may be excluded without violating their First Amendment rights. The university, however, may not preclude students from discussing certain topics at their meetings in the forum. While the nature of the forum necessarily requires exclusion of "outsiders," it does not require that "insiders" confine their discussions to university-approved topics. In this type of "limited" forum, then, a content-based restriction of certain subject matter must be narrowly drawn and further a compelling state interest. *See Widmar v. Vincent*, 454 U.S. at 270. *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

A converse yet analogous situation is presented in the case of government bodies which hold "public meetings" in order to gain input from citizens on a given issue. Unlike the university situation, the forum may be limited as to subject matter but not as to the status of the participants. Having created a forum for the general public to discuss a given topic, the government may very well limit or even prohibit discussion of impertinent matters. *See, e.g., City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. at 175 n.8. Absent compelling justifications, however, the government may not confine the participants in the discussion to "one category of interested individuals." *Id.* at 175. While irrelevant topics may be excluded dur-

ing such a public meeting, the nature of the forum is such that individuals may not be barred from the discussion without a substantial justification.[9]

The plaintiffs argue that the Williamsport Area High School has created a limited public forum as did the university in the situation described above. *See Widmar v. Vincent*, 454 U.S. at 263. The court agrees that the high school's decision to create an activity hour to promote and stimulate student group participation is factually similar to the situation in *Widmar*. It is undisputed that the activity period is "generally open for use by student groups." *See generally Widmar v. Vincent*, 454 U.S. at 267. At the present time, more than twenty-five student organizations benefit from this forum. *See* Document 21 of the Record at 3-4; Document 22 of the Record at 3. These include a newspaper, a literary magazine, a speech and drama club and student governments. Perhaps more importantly, it is undisputed that the high school has *never* deprived any other proposed group from benefiting from the activity period. Finally, the principal stated that he would grant this benefit to any student organization deemed to be "a legal and proper" one. These factors demonstrate that the high school has adopted a policy of "equal access" to student groups. Accordingly, since there is no evidence supporting a contrary conclusion, the court must find that this activity period is "generally open for use by student groups" within the meaning of the *Widmar* case. *Cf. International Soc'y For Krishna Consciousness v. New Jersey Sports and Exposition Authority*, 691 F.2d at 160 ("since

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[9] Defendants do not argue that the activity period is designed to promote the discussion of a certain subject matter. *See generally* City of Madison Joint School District No. 8 v. Wisconsin Public Employment Relations Commission, 429 U.S. 167 (1976). Moreover, there is no contention that Petros would fail to satisfy one or more of the objectives which student clubs are designed to promote, *i.e.*, "the intellectual, physical and social development of students," *see* Document 21 of the Record at 3.

the exchange of ideas is an essential part of the educational process but the need for discipline and order is great, a public high school is probably a limited forum). This being a "limited" forum, in the sense that its use is "limited" to student groups, a content-based decision to exclude subject matter would require compelling state interest scrutiny.[10]

Notwithstanding that *Widmar* appears to control under these facts, the court feels that some discussion of the unique nature of a high school must be undertaken before deciding that the compelling state interest test must apply here. Indeed, the *Widmar* Court emphasized that "First Amendment rights must be analyzed 'in light of the special characteristics of the school environment.'" 454 U.S. at 267-68 n.5 (quoting *Tinker v. Des Moines Independent School District*, 393 U.S. at 506). It takes no great insight to realize that a high school possesses "special characteristics" not present in a college environment. Thus, it is clear that there may be some instances in which a high school forum does not give rise to the same right of expression as does a university forum.

The First Amendment rights of high school students "are not coextensive with those of adults and may be modified or curtailed by school policies that are reasonably designed to adjust those rights to the needs of the school environment." *Nicholson v. Board of Education Torrance Unified School District*, 682 F.2d 858, 863 (9th Cir. 1982); *accord*, *Williams v. Spencer*, 622 F.2d 1200, 1205 (4th Cir. 1980). One such need involves order and discipline. Despite the fact that a limited forum is involved, it would seem clear that a school administrator legitimately may decide to exclude an activity if it would interfere "with the school['s] work or . . . the rights of other students to be secure and to be left alone." *See*

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[10] Although not raised by the parties, the court would note that by denying Petros recognition, the defendants engaged in a form of prior restraint. *See* Healy v. James, 408 U.S. 169 (1972).

Tinker v. Des Moines Independent Community School District, 393 U.S. at 508. Moreover, a school official permissibly may act upon his judgment that the school simply cannot accommodate all requests for time and space in the limited forum. This may entail content-based decision-making. *See, e.g., Board of Educ., Island Trees Union Free School District v. Pico*, 102 S.Ct. at 2814 n.1 (Blackmun, J., concurring); *id.* at 2829 (Rehnquist, J. dissenting). While content-based decisions *may* be permissible in such instances, *see Widmar v. Vincent*, 454 U.S. at 278-79 (Stevens, J., concurring), it is significant that the defendants in this case claim neither that Petros cannot be accommodated because of time or space limitations nor that the group would disrupt the high school's educational mission in any way.

Perhaps the most apparent difference between high schools and universities is the role of administrators in making curricular choices. Of course, the high school curriculum is more structured than that of a university. *Cf. Board of Educ., Island Trees Union Free School District v. Pico*, 102 S.Ct. at 2830-31 (Rehnquist, J., dissenting) ("Unlike university . . . libraries, elementary and secondary school libraries are not designed for free-wheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas). Relying upon "their duty to inculcate community values," high school administrators justifiably may make content-based decisions with respect to curricular choices. *Id.* at 2809 (plurality opinion). If the alleged forum is, in reality, a mere extension of the curriculum, it would make perfect sense to permit an administrator to decide what shall be included on the basis of content. *See e.g., Seyfried v. Walton*, 668 F.2d 214, 216 (3d Cir. 1981) (where school play is "integral part" of curriculum, as opposed to "non-program related expressions of opinion," it is analogous to courses offered by school and a content-based decision to prohibit its presentation does not implicate First Amendment rights of students). As a practi-

cal matter, however, if an "activity period" can be considered part of the curriculum, it probably will not be deemed to be a "forum generally open for use by student groups." *See generally Widmar v. Vincent*, 454 U.S. at 267. Hence, a content-based exclusion in such circumstances would not be scrutinized under the compelling state interest standard.

Notably, in the present case, the defendants do not claim that the activity period is a "program-related" function of the school, and they do not contend that the exclusion of Petros was based in any way upon curricular concerns. *The only justification offered for the exclusion is that the school does not wish to violate the Establishment Clause.* This being the case, the court can find nothing to preclude the application of *Widmar* in this, a high school, context. Accordingly, the court must inquire whether the content-based restriction is narrowly drawn and justified by a compelling state interest. The *Widmar* Court observed that a school's interest in fulfilling its obligations pursuant to the Establishment Clause "may be characterized as compelling." 454 U.S. at 271. Having found no Establishment Clause problem, however, the Court did not reach the question whether these obligations rise to the level of a "compelling state interest" sufficient to justify a content-based exclusion of speech. *Id.* at 273 n.13.[11] In the present case, then, this court

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[11] In Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), the Second Circuit observed that the Establishment Clause provides the needed compelling state interest to outweigh a free exercise claim asserted by students. 635 F.2d at 978. The *Brandon* Court cited the Supreme Court's decision in Sherbert v. Verner, 374 U.S. 398 (1963). This court respectfully disagrees with the view that *Sherbert* stands for this proposition. The *Brandon* opinion indicates that the Second Circuit maintains the same position regarding free speech claims. 635 F.2d at 980 ("sensitive Establishment Clause considerations limit [students'] right[s] to aid religious doctrines"). It is unclear whether the *Brandon* court believed that the Establishment Clause provides

initially must examine the Establishment Clause implications that would arise from a decision by the defendants to allow Petros to meet. If such a decision would not contravene the clause, there will be no need to go further. The plaintiffs will be entitled to the relief that they seek.

ESTABLISHMENT CLAUSE DEFENSE

The defendants argue that to allow Petros to meet at the high school would violate the three-pronged test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The plaintiffs, heavily relying upon the Supreme Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981) argue not only that recognition of "Petros" would not transgress the constraint of the Establishment Clause but that the failure to recognize the group violates the Establishment Clause.

The Establishment Clause of the United States Constitution provides "Congress shall make no law respecting an establishment of religion," U.S. Const. Amend. 1, and

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a compelling interest with respect to free speech or simply limits the free speech rights of students in the first instance. However, Judge Kaufman, the author of the *Brandon* opinion, observed nearly ten years earlier, "[i]t is characteristic of resolutions of first amendment cases, where the price of freedom of expression is so high and the horizons of conflict between countervailing interests seemingly infinite, that they do not yield simplistic formulas or handy scales for weighing competing values." James v. Board of Educ., 461 F.2d 566, 575 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972) (holding that school board cannot prevent teacher from wearing armband to protest war without showing that such conduct threatens legitimate interests in regulating curriculum or preserving order). In any event, inasmuch as *Brandon* is not binding upon this court, it is unnecessary to attempt to resolve the question. The court will merely note that some of the Second Circuit's comments do not survive the Supreme Court's *Widmar* decision. *Compare* 454 U.S. at 269 & n.6 ("prayer" is protected "speech") *with* 635 F.2d at 980 (finding distinction between "prayer" and "discussions about religious matters" to be "compelling").

is applicable to the states through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Supreme Court has established a tripartite test for determining whether a governmental policy transgresses the Establishment Clause: "First, the [policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman, supra*, 403 U.S. at 612-13; *see Larson v. Valente*, 456 U.S. 228, 252 (1982); *Committee for Public Education v. Regan*, 444 U.S. 646, 653 (1980; *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). If a governmental policy fails to pass even one of the prongs of the *Lemon* test, it must be held violative of the Establishment Clause. *See, e.g., Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman, supra*, 403 U.S. at 612; *School District of Abington Township v. Schempp*, 374 U.S. 203, 222-27 (1963). The court shall examine each of the *Lemon* factors in turn.

The initial inquiry in an Establishment Clause analysis is whether the policy at issue has a secular purpose. Defendants argue that its authorization of "Petros", a nondenominational prayer group whose purpose is to promote spiritual growth, would fail this portion of the *Lemon* test because this club is religious and *a fortiori* nonsecular in nature. Such an argument, however, misconceives the nature of the inquiry. The question is not whether an individual's activity can be characterized as having a religious purpose. Rather, the focus is whether the government policy which *allows* the activity has a secular purpose. *See Widmar v. Vincent, supra*, 454 U.S. at 271; *Committee for Public Education v. Regan*, 444 at 654; *Mueller v. Allen*, 676 F.2d 1195, 1198 (8th Cir. 1982); *Brandon v. Board of Educ.*, 635 F.2d at 978; *Florey v. Sioux Falls School District*, 619 F.2d 1311,

1314-15 (8th Cir. 1980). The nonsecular purpose or the activity itself would be determinative of the secularity of the governmental policy only if the policy is adopted with a view toward promoting the nonsecular activity. *See Stone v. Graham*, 449 U.S. 39, 41-42 (1980); *School District of Abington Township v. Schempp*, 374 U.S. at 223; *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962); *American Civil Liberties Union v. Rabun County Chamber of Commerce*, 678 F.2d 1379, 1390 (11th Cir. 1982); *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038, 1044-45 (5th Cir. 1982), *cert. denied*, —— U.S. —— (1983); *Karen B. v. Treen*, 653 F.2d 897, 900-01 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982); *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 929-30 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981). Such is plainly not the case here.

The school's policy of allowing student groups to meet during the activity period was not adopted to provide a forum for religious discussion. Indeed, the policy long predated Petros' request. Moreover, the instant suit would seem to belie any such conclusion. The situation at bar is distinguishable from that presented in *Lubbock Civil Liberties Union v. Lubbock Independent School District*, *supra*, 669 F.2d 1038. The policy at issue in *Lubbock* "appear[ed] in the middle of a policy concerned with religious activities in the schools. The preamble to the policy is obviously concerned with religious beliefs and the place of *religion* in the public schools. The language . . . indicates that the *focus* of this paragraph is with students who wish to meet for educational, *religious*, moral and ethical purposes." *Id.* at 1044-45 (footnote omitted) (emphasis in original). Although the policy in *Lubbock* was ostensibly designed to allow many groups to meet, when it was examined in the context of the total school policy, its nonsecular purpose became apparent. No such facts are present in this case. Moreover, the *Lubbock* court's conclusion that a nonsecular purpose was

present cannot be divorced from that school district's prior practices of lending vigorous support to religion. *See id.* at 1039-41. A similar history is conspicuously absent in the present case.

The avowed purpose of the Williamsport High School's policy in creating the activity period was to promote the intellectual, physical and social development of its students. There are no facts in the record to indicate that this declaration is inaccurate or self-serving. The purpose of this open forum is thus a secular one. *Accord Brandon v. Board of Educ.*, 635 F.2d at 978. The mere fact that a religious group wishes to take advantage of this forum by gaining access to it on the same basis as other groups does not convert the policy's aim into a nonsecular one. *See Widmar v. Vincent, supra*, 454 U.S. at 271-72 n.10; *Brandon v. Board of Educ.*, 635 F.2d at 978.

The second inquiry is whether the challenged government policy would have the "primary effect" of advancing religion. Under this prong of the *Lemon* test, the policy will be upheld if it merely "accommodates" religion. Neither hostility toward nor advancement of religion is permitted. The distinction between advancement and accommodation is often a difficult one to make. Nevertheless, the distinction exists, and is one which makes a constitutional difference. *Compare Zorach v. Clauson*, 343 U.S. 306 (1952) *with Illinois ex rel. McCollum v. Board of Educ.* 333 U.S. 203 (1948). Hence, although the line separating accommodation from advancement sometimes appears blurred, it is a line which must be drawn, and drawn with as much precision as logic and precedent will allow.[12] Defendants argue that

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[12] Under the traditional meanings of the terms "accommodation" and "advancement," the instant question could be resolved without extended analysis. An "accommodation" is "something supplied for

by allowing Petros to meet during the activity period they would cross the line between accommodation and advancement. Specifically, they contend that the nature of a high school and the age of its students, are such that allowing Petros to meet would put an "imprimatur" of state approval on its activity and, accordingly, have the primary effect of advancing religion.

In *Widmar v. Vincent, supra*, the Supreme Court rejected a state university's contention that a decision to accord to religious groups a right of equal access to its public forum would have the primary effect of advancing religion. 454 U.S. at 273. Finding instead that any religious benefit of the university's open forum would be "incidental," the Court relied on two factors:

> First, an open forum in a public university does not confer any imprimatur of State approval on

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convenience or to satisfy a need," while an "advancement" is an action taken "to accelerate the growth or progress" of something. *See* Webster's New Collegiate Dictionary (G & C Merriam Co. 1979). Given the fact that the plaintiffs submitted their request without being encouraged by any form of government impetus, it is difficult to see how the school board would "advance" religion by granting the request. Rather, it would "accommodate" religion by supplying to the plaintiffs a convenience already granted to all other student groups. Such passive conduct lacks the elements of endorsement, furtherance or support implicit in the definition of "advancement." Accordingly, unless every "accommodation" is to be treated as an "advancement" of that which is being accommodated, the defendants clearly could allow the plaintiffs to meet.

Notwithstanding their ordinary definitions, however, the words "accommodation" and "advancement" have appeared to acquire a different meaning in this area of the law. For instance, an "accommodation" may be regarded as an "advancement" of religion if the government's decision to supply a convenience or recognize a need *appears* to represent an endorsement or furtherance of religion, *viz.*, the "imprimatur" concept. *See* discussion in text, *infra*. Accordingly, the court feels obliged to disregard traditional notions of "accommodation" and "advancement" and refer exclusively to the case law which defines these terms in the specialized context of the Establishment Clause.

> religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals," than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities. 635 F.2d at 1317.
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> Second, the forum is available to a broad class of nonreligious as well as religious speakers; there are over 100 recognized student groups at UMKC. The provision of benefits to so broad a spectrum of groups is an important index of secular effect. *See e.g., Wolman v. Walter*, 433 U.S. 229, 240-41 (1977); *Committee for Public Education v. Nyquist*, *supra*, at 781-82 and n.38. If the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Roemer v. Maryland Public Works Bd.*, *supra*, at 747 (plurality opinion) quoted in *Committee for Public Education v. Regan*, 444 U.S. at 658 n.6. At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's "primary effect."

454 U.S. at 274-75 (footnotes omitted).

As was the case in *Widmar*, the Williamsport Area High School activity period evinces "an important index of secular effect" in that it is open to "a broad . . . spectrum of student groups." *See id.* at 274. While the number of groups presently using the period is smaller than that involved in *Widmar*, it is not so small as to prevent the court from finding a "broad' class. Indeed, it is natural to expect that a high school would have a smaller number of these organizations, given that the student body is smaller and is drawn from a more nar-

row population base than usually is the case with a university. The number of groups presently using the activity period exceeds twenty-five. More importantly, these groups span a wide range of interests, including, *inter alia*, sports, government, social service, dramatics, journalism, language and music. The scope of the activity period at issue here is limited only by the range of students' interests. The school has expressed a great willingness to recognize and accommodate those interests. This, of course, is supported by the fact that the principal has never denied the use of school facilities to any group and has indicated that he would only do so if required by law.

Given the range of interests accommodated by the activity period, the court believes that like treatment of Petros would confer only a "general benefit" upon it rather than furthering its aims. The general benefit Petros seeks is the availability of a room during this part of the school day. In addition, it seeks the administration's passive acquiescence—leaving them to pray and discuss matters that concern the religious aspect of their lives. In essence, these students want the government passively to acknowledge that they have religious interests, just as others are "benefiting" from the government's recognition that they are interested in sports, journalism or the theatre. By recognizing that students have these religious interests, the school would not be "advancing" religion in the Establishment Clause sense, for the Constitution itself recognizes the existence of such interests. Any advancement of religion would come from the students themselves, and this the Establishment Clause does not bar, it being a limitation on government conduct rather than on individual activity.

Although the plaintiffs seek what they call "equal access," it is important to emphasize that they really seek something less than "equal" treatment. Apparently realizing that certain government support would indeed

lead to an "advancement" of religious ideals, they do not ask for *all* that another group might obtain. While a sports team might seek a coach, Petros does not demand an instructor. While a drama club might seek a script, Petros does not demand a Bible, the Koran, or other religious text. While a journalism club might seek paper and ink, Petros does not demand a Star of David, a cross or other religious articles. What Petros demands are the three things accorded to *every* student organization—time, space and the permission to use them.

The mere fact that a small portion of public funds would be expended for the lighting and heating of the facility to be used by Petros does not, standing alone, indicate that the primary effect of an equal access policy would be to advance religion. The Supreme Court in *Widmar* rejected the district court's conclusion that *Tilton v. Richardson*, 403 U.S. 672 (1971) stood for the proposition "that state funds may not be used to provide or maintain buildings used by religious organizations." 454 U.S. at 272-73 n.12. "[N]othing in *Tilton* suggested a limitation on the State's capacity to maintain forums equally open to religious and other discussions. Cases before and after *Tilton* have acknowledged the right of religious speakers to use public forums on equal terms with others. *See, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Saia v. New York*, 334 U.S. 558 (1948)." *Widmar v. Vincent*, 454 U.S. at 272-73 n.12.[13] *See also School District of Abington Township v. Schempp*, 374 U.S. at 261-62 (Brennan, J., concurring).

Accordingly, the court concludes that the number and spectrum of student groups at the Williamsport Area High School is sufficiently broad to indicate that recog-

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[13] *Cf.* Wolman v. Walter, 433 U.S. 229, 240 (1977); Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 747 (1976); Meek v. Pittenger, 421 U.S. 349, 360 (1975); O'Hair v. Andrus, 613 F.2d 931 (D.C.Cir. 1979).

nitior of Petros would benefit religion only incidentally. *See Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d at 522 (Weis, J., concurring) ("if a particular legislative enactment . . . provides clearly observable secular benefits, then religious institutions should not be barred solely because of their status").

The other factor relied on by the *Widmar* Court in concluding that an open forum does not transgress the "primary effects" test was the lack of "any imprimatur of State approval on religious sects or practices." 454 U.S. at 274. Consideration of this factor in the instant case is more difficult than in *Widmar*, as this case involves high school students. *See id.* at 274 n.14. To this task the court now turns.

It has been suggested in some cases that school-aged children lack sufficient maturity to understand that activity taking place on school premises does not always carry with it an imprimatur of state approval on these practices. *See, e.g., Lubbock Civil Liberties Union v. Lubbock Independent School District, supra*, 669 F.2d at 1045-47; *Brandon v. Board of Education, supra*, 635 F.2d at 978; *Johnson v. Huntington Beach Union High School District, supra*, 137 Cal. Rptr. 3d at 49-50. In *Widmar v. Vincent, supra*, the Court dispelled the notion that college-aged students could not appreciate that a university's equal access policy did not imply approval—tacit or otherwise —of the various groups' activities.

Here the students who may "perceive approval" are not yet adults. However, this court cannot accept the notion that, under the circumstances of this case, high school students would perceive the "open forum" policy as tacit endorsement by school officials of a club's religious activity. Cases, such as *Engel v. Vitale, supra*, and *School District of Abington Township v. Schempp, supra*, in which the "imprimatur" of state approval was relied on, in part, to invalidate the activity under the Establishment Clause involved both secondary and ele-

mentary schools. Certain generalizations made in those cases involved not only the maturity levels of high school students but of elementary school students as well. While this case does not involve students at the college age, neither does it involve children in the primary grades. Moreover, in the twenty years since *Engel* and *Abington*, high school students have become more advanced. While they are not yet adults, they should not be treated as infants. As Judge Rosenn recently observed in another context:

> [T]he court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the latter grades of secondary schools. As a result, more deference should be shown school authorities' curricular decisions regarding grade school, and perhaps junior high school students, in the face of a challenge that a particular point of view has been excluded. High school students, in contrast, are at an age approaching both adulthood and franchise. As the Second Circuit has noted in a related context, "It would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play an essential role in preparing their students to think and analyze and to recognize the demagogue." *James v. Board of Education*, 461 F.2d 566, 574 (2d Cir.), *cert. denied*, 409 U.S. 1042, 93 S. Ct. 529, 34 L.Ed. 2d 491 (1972).

Seyfried v. Walton, 668 F.2d 214, 219-20 (3d Cir. 1981) (Rosenn, J., concurring) (footnote omitted); *accord*, *Russo v. Central School District No. 1*, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *Wilson v. Chancellor*, 418 F. Supp. 1358, 1368 (D.Ore. 1976); *Bayer v. Kinzler*, 383 F. Supp. 1164, 1166 (E.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 504 (2d Cir. 1975). *But see Brandon v. Board of Education of the Guilderland School District*, 635 F.2d at 978.

In addition to the higher level of maturity, the factual situation at bar is materially different from the facts involved in the Supreme Court's well-known "school prayer" cases. In *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), for example, a school board *required* religious instruction periods to be held each week in the classrooms using outside religious instructors under the supervision of the school district superintendent. Although participation in the program was voluntary—those who did not wish to participate retired elsewhere for secular instruction—the students were, in effect, placed in two categories, *i.e.*, those taking religious instruction and those who were not. Similarly, *Engel v. Vitale*, 370 U.S. 421 (1962) involved a program in the New York State schools whereby a prayer—*composed by the state*—was *required* to be recited in the public schools at the beginning of each day. Here again, the participation while nominally voluntary, forced students to be classified as religious or nonreligious. Finally, *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) presented a challenge to state statutes *requiring* the reading of verses from the Bible at the commencement of the school day. Although participation was voluntary, the exercise was mandatory with the resultant religious/nonreligious classification.

Clearly then, *Engel*, *Schempp* and *McCollum* involved religious activity not merely allowed by the state but required by it. In each case, the activity took place en masse—the students were all assembled in their respective classrooms so that those who did not wish to participate had to conspicuously absent themselves—and the exercises were actively participated in by the teachers. Although the Supreme Court has noted that the presence or absence of state coercion is not dispositive in Establishment Clause cases, such a factor appears important in gauging the likelihood that the government will be taken to have placed its imprimatur on a given religious practice.

The situation at bar is fundamentally different from the traditional school prayer cases. Williamsport Area High School's open forum policy would not permit the type of en masse recitation of religious doctrine at the start of the school day, such as in *Engel*, *Schempp* and *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982) or during school assemblies, such as in *Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981). Moreover, an equal access policy would not force a choice between participating in a "religious" group, such as Petros or a secular one. *Cf. School District of Abington Township v. Schempp*, *supra*, 374 U.S. at 223; *Engle v. Vitale*, *supra*, 370 U.S. at 430; *Illinois ex rel. McCollum v. Board of Education*, *supra*, 333 U.S. at 208-09; *Karen B. v. Treen*, *supra*, 653 F.2d at 899. The record in this case reveals that the students not only have a choice among many group activities but may choose not to participate in any club. Instead, the time may be used as a study period, to do homework, to read in the library or receive extra help from a teacher. Deposition of Wayne A. Newton, Document 16 of the Record at p. 10. The lack of en masse activity together with the more varied alternatives reduces any perception of state approval or student embarrassment.

Moreover, it appears that Petros is willing to occupy a less favorable position among the various other organizations using school facilities. For instance, the exhibits submitted to the court demonstrate that many of the student activities are described in the school yearbook. The yearbook names the individuals associated with each activity, sets forth pictures depicting various functions and describes the successes achieved by the groups during the previous school year. The plaintiffs have represented that they are willing to do without these benefits. They have advised the court that they would not complain if they are also left out of the school newspaper. Finally,

they have represented through counsel that they will not request access to the school's public address system to announce the times and places of their meetings to the student body. These factors support the conclusion that the students in this high school are not likely to view the Petros meetings as an endorsement of religion by the school. The defendants have offered no evidence tending to show that Petros would be viewed as an organization that is being granted anything more than an accommodation by the school administration. Hence, the school's policy of providing a forum to be used in common by all student groups "may fairly be viewed as reflect[ing] a neutral posture toward religio[n]." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 782 (1973). *See also id.* at 782 n.38 (distinguishing *Nyquist* from *Board of Education v. Allen*, 392 U.S. 236 (1968) and *Everson v. Board of Education*, 330 U.S. 1 (1947) on the basis that the class of beneficiaries in those cases included *all* school children). Indeed, to say that Petros *alone* is barred from utilizing the forum created by the Williamsport Area High School could manifest a hostility toward religion. *See Lubbock Civil Liberties Union v. Lubbock Independent School District*, 680 F.2d 424, 426 (5th Cir. 1982) (Reavley, J., dissenting from a Denial of Rehearing En Banc). The Establishment Clause acts as a proscription against hostility to, as well as advancement of, religion. *See Committee for Public Education v. Regan*, 444 U.S. at 653; *Epperson v. Arkansas*, 393 U.S. at 104; *School District of Abington Township v. Schempp*, 374 U.S. at 218-19.

Another factor militating against a finding that the school will place its imprimatur upon Petros' activities is that, unlike *Engel* and *Schempp*, the policy herein has a clear secular purpose. While the existence of a secular purpose does not, of course, foreclose a finding of "advancement of religion," it diminishes the risk that the public will perceive the state policy as an "advancement" or "approval" of a particular religion or religious prac-

tice. *Cf. Florey v. Sioux Falls School District*, 619 F.2d at 1316 (when primary purpose of a given school activity is secular, the activity does not have the primary effect of advancing religion by the inclusion of some religious content); *Gilfillan v. City of Philadelphia*, 637 F.2d at 931 n.6 (design of platform for papal visit to include cross relevant both to purpose and effect of city's action). For example, in *School District of Abington Township v. Schempp, supra*, the Court focused on the nonsecular purpose of the Bible reading exercise in striking the law down. While the Court also spoke in terms of the primary effect of the law, 374 U.S. at 222, the imprimatur of state approval in *Schempp* could not be totally divorced from the patently nonsecular purpose of the law. *See generally id.* at 288 (Brennan, J., concurring) ("excusal or exemption simply has no relevance to the establishment question, *if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims*") (emphasis added).

The Supreme Court has recognized that within the confines of the Establishment Clause "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. at 669. This court believes that the present case falls within that "room of neutrality." To paraphrase the *Widmar* Court: "It is possible—perhaps even foreseeable—that [Petros] will benefit from access to [high school] facilities. [But] . . . a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion." 454 U.S. at 273. The direct and immediate effect of allowing Petros to meet would not be an endorsement of religion but rather a furtherance of the students' noncurricular development. Not unlike the bus transportation reimbursement in *Everson v. Board of Education*, 330 U.S. 1 (1947) and the textbook loan

program in *Meek v. Pittenger*, 421 U.S. 349 (1975), an equal access policy affords to all students the benefit of using school facilities. The benefit in this case furthers the students' personal development by allowing them to convene in the pursuit of a common interest.[14] *See generally Widmar v. Vincent, supra*, 454 U.S. at 273.

The final inquiry is whether the policy at issue involves "excessive entanglement." *See, e.g., Larson v. Valente*, 456 U.S. at 255; *Roemer v. Board of Public Works of Maryland*, 426 U.S. at 762; *Walz v. Tax Commission*, 397 U.S. 674-75 (1970). In support of their contention that recognizing and allowing Petros to meet would require excessive entanglement with religion, defendants point to two factors: the expenditure of public funds in providing a place for Petros to meet and the necessity of a teacher to monitor the meetings. The Court has previously examined the defendants' expenditure of funds argument and the reasons for its rejection need not be repeated. It suffices to say that the Establishment Clause does not prohibit a de minimis expenditure from the public fisc to *incidentally* aid religion.

The plaintiffs have requested that "a faculty advisor . . . be present at [Petros'] meetings solely for purposes of ensuring good order and not for any purpose related to the religious content of the meetings." *See* Complaint ¶ 57(C), Document 1 of the Record. The court does not believe that this would involve excessive entanglement. Inasmuch as the teacher would be present only to ensure orderly meetings,[15] the instant situation would involve no

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[14] The common interest asserted by these plaintiffs is "to promote spiritual growth and positive attitudes in the lives of its members." Exhibit 3 to Document 8 of the Record.

[15] According to the uncontraverted affidavit of Lisa Bender, the teacher present at the first meeting of Petros did not take part in any of the discussion. Rather, the teacher took attendance and spent the remaining time grading papers. *See* Affidavit of Lisa Bender, Document 24 of the Record at 2.

more entanglement than when a state provides for "the safety, security and general convenience" for persons attending the celebration of a Mass at the National Mall, *see O'Hair v. Andrus, supra*, 613 F.2d at 935, or provides police and fire protection to a church, *see Roemer v. Board of Public Works of Maryland*, 426 U.S. at 747; *Everson v. Board of Education*, 330 U.S. at 17. The teacher chosen to "monitor" the meetings would be the functional equivalent of a policeman at a religious rally held in a public park, *see generally id.*; *O'Hair v. Andrus*, 613 F.2d at 935. Just as the policeman in the above situation is acting to fulfill an obligation to society by ensuring peaceful discussion, so too would a teacher acting as a monitor during Petros' meetings be fulfilling an obligation to the school by maintaining order among the students. While the teacher's presence certainly would involve some "entanglement" with the meetings, such "limited and incidental entanglement between church and state authority is inevitable in a complex modern society." *Larkin v. Grendel's Den, Inc.*, 103 S. Ct. 505, 510 (1982) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 670 (1970)). In short, the "entanglement" would not be "excessive."

Moreover, the court has been informed by plaintiffs that they would be willing to withdraw the request for an "advisor" if necessary to avoid an excessive entanglement problem. It appears then that the request for a monitor was prompted by the defendants' "unwritten policy" that an adult must be present at student meetings. There being no problem of entanglement in any event, it is unnecessary to address the plaintiffs' proposal.

The court having reviewed each prong of the tripartite *Lemon* test, and having found no potential violation thereof, the defendants' "Establishment Clause defense"

must fail. Accordingly, the defendants have not enunciated a constitutionally-acceptable justification for their content-based exclusion of the plaintiffs from the benefits of the activity period. Therefore, the plaintiffs are entitled to summary judgment.

CONCLUSION

The court is fully aware that the result reached in this case will not be free from doubt unless and until the Supreme Court clarifies two very important areas of the law—the extent to which there can be a "forum" for students in our high schools and the status of prayer in those institutions when initiated by students acting independently of outside influences. It may seem unusual that this case is so difficult to resolve, for *Widmar* appears nearly "on point." But for the fact that the present dispute involved a high school, *Widmar* clearly would have controlled. By the same token, it can be argued that *Engel* and *Schempp* should have governed the disposition of this case. But for the fact that the instant situation involved a purely student-initiated request to use a forum created by the school, the "school prayer" cases may very well have been dispositive. As noted at the outset of this opinion, the facts of this case are crucial. Under these facts, the court believes that the scales have tipped in the direction of applying *Widmar* rather than the "school prayer" cases.

The instant decision is a narrow one. The court does not hold that the Establishment Clause can never provide the "compelling state interest" necessary to defeat an otherwise valid free speech claim. That question is an open one. The court does not hold that public high school students have an indefeasible right to form prayer groups in these institutions. They do not. The court does not hold that all high school activity periods are "limited forums" conferring the full panoply of free speech rights upon students. That question depends upon the facts

presented. The court does not hold that "voluntary school prayer" is, in all instances exempt from the scope of the Establishment Clause. It is not.

The court merely holds that *under the precise set of undisputed facts presented*, the defendants have created an open forum for the students' use, have excluded the plaintiffs by reason of the content of their speech, and have not demonstrated that the Establishment Clause requires such discrimination. Chief Justice Burger once made a salient observation concerning the difficult task of reconciling the sometimes competing values embodied in the religion clauses of the Constitution. His words are well worth repeating in the present context, for another constitutional value has been drawn into the fray—freedom of speech:

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.
>
> The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if extended to a logical extreme, would tend to clash with the other. For example, in *Zorach v. Clauson*, 343 U.S. 306 (1952), MR. JUSTICE DOUGLAS, writing for the Court, noted:

> "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State." *Id.*, at 312. "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Id.*, at 313.

MR. JUSTICE HARLAN expressed something of this in his dissent in Sherbet v. Verner, 374 U.S. 398 (1963), saying that the constitutional neutrality imposed on us

> "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation." *Id.*, at 422.

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with the religious beliefs and practices or have the effect of doing so.

Walz v. Tax Commission, 397 U.S. at 668-69.

The court believes that the present result falls within the realm of what the Chief Justice called "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

An appropriate Order will enter.

/s/ William J. Nealon, Jr.
Chief Judge
Middle District of Pennsylvania

Dated: May 12, 1983

ORDER

NOW, this 12th day of May, 1983, in accordance with the reasoning set forth in the accompanying Opinion, it is hereby ordered that:

(1) Summary judgment is granted in favor of the defendants and against the plaintiffs on plaintiffs' free exercise claim;

(2) Summary judgment is granted in favor of the plaintiffs and against the defendants on plaintiffs' freedom of speech claim; and,

(3) The Clerk of Court shall close this case.

/s/ William J. Nealon, Jr.
Chief Judge
Middle District of Pennsylvania

APPENDIX D

GERALD W. SEEVERS
Attorney at Law

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Williamsport, Pennsylvania 17701
Business 717-727-1223
Residence 717-322-3407

October 5, 1984

Nathan W. Stuart, Esquire
21-23 W. Third Street
Williamsport, PA 17701

Re: Bender, et al. vs. Williamsport Area School District, et al.

Dear Nate:

We have been advised by a number of students interested in forming a Petros club this school year, that the Williamsport School District has chosen to deny them permission to meet during the regularly scheduled activity period. We would appreciate being advised of the legal basis for this action.

As you know, while the Third Circuit Court of Appeals has reached a decision, the decision has not been made final. On August 28, 1984, the Court granted the students' motion for a stay of mandate until at least November 13, 1984. We are now preparing a petition for a writ of certiorari to the Supreme Court. By law, therefore, the stay of mandate will continue until the Supreme Court refuses to hear our case or until it renders a decision. Accordingly, the decision of District Court Judge Nealon

is still in effect. Refusal to abide by that decision constitutes, in our opinion, contempt of court.

In addition, the Equal Access Act became law on August 11, 1984. The law clearly applies to Petros. Both the District Court and the Third Circuit held that Williamsport has created a "limited public forum". Since Petros is a student-initiated and student-led activity and the activity period is held before actual classroom instruction begins, the Act applies. Accordingly, the refusal of the school district to permit Petros to meet violates the Equal Access Act.

We also believe the action by the school district in refusing the students permission to meet manifests an open hostility to religion in violation of the First Amendment. As you well know, Petros met during the 1983-84 school year without incident. Their meetings were held in "D" Cafeteria, located in a sublevel away from classroom areas. Thus, the only students using the stairways to this part of the building were Petros students.

All the meetings by Petros were orderly, student-initiated and student-led. The students discussed peer problems, school problems and problems facing some at home. In addition, the students read Scripture, which had special meaning to the particular student. The students asked prayer for themselves, their families, teachers, friends, and whatever the particular needs might be. No one was asked to or forced to pray.

All the meetings were open to any student at the school wishing to attend. The meeting was monitored by a teacher who volunteered to do so. The teacher sat at a table away from the student group, graded papers, or was involved with lesson preparations. At the end of the meeting, the Petros students went to their first academic class.

During the entire school year, not a single student expressed to those attending Petros the belief that the school

was "sponsoring" Petros simply because they were permitted to meet. Nor has there been any evidence or suggestion of divisiveness created by the Petros meetings. Thus, all the hypothetical fears which led the Third Circuit to its opinion are not present at Williamsport High School. There is, therefore, no sound reason whatsoever to suggest that any harm will flow by allowing the students permission to meet while the stay of mandate is in effect.

Please consider this as a formal request to the school district to reconsider its closed door policy. Should Petros not be permitted to meet, the students have no alternative but to take appropriate legal action to protect fundamental constitutional and, now, statutory rights.

We await your reply.

Sincerely,

/s/ Gerald W. Seevers
GERALD W. SEEVERS
SAMUEL ERICSSON
KIMBERLEE COLBY
CURRAN TIFFANY
JAMES SMART
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October 10, 1984

Gerald W. Seevers, Esq.
416 Pine St., Suite 410
Medical Arts Building
Williamsport, PA 17701

Re: Bender, et al. vs. Williamsport Area School District, et al.

Dear Jerry:

This will acknowledge receipt of and is in response to your letter addressed to me of October 5, 1984 in the above matter.

I do not understand how anyone can interpret any of the actions taken by the Williamsport Area School District with regard to Petros as manifesting "an open hostility to religion". When the Petros group first asked the School District in 1981 for permission to meet during the activity period, the School District asked its solicitor for an opinion and when that opinion indicated it would be constitutionally improper to grant the request, the School District merely relied upon this opinion and acted accordingly. After Judge Nealon wrote his opinion in the Bender case in 1983 and granted "summary judgment" in favor of the students, the School District complied with this decision and permitted Petros to meet. When the Third Circuit Court of Appeals reached its decision in 1984 and reversed the District Court, the School District once more determined to abide by what then became the law on this matter in this jurisdiction as determined by

the highest court yet to consider the case and accordingly advised Petros it would no longer be permitted to meet during the activity period.

Your letter suggests that the "stay of the mandate" has the legal effect of preserving the District Court opinion as the "law" on the subject until such time as certiorari is denied or, if granted, until such time as the Supreme Court may sustain the opinion of the Third Circuit Court of Appeals. That is *not* my *understanding* of the legal effect of the "stay of the mandate". My understanding is that the "stay" means merely that all matters relating to the case remain with the Third Circuit Court of Appeals during the "stay" and that the District Court has no jurisdiction to take any action or to make any orders in connection with the case until the "stay" is ended and the "mandate" is issued. I do *not* understand that the Circuit Court's opinion is held in abeyance and is to be disregarded for the duration of the "stay".

As a matter of fact, I have been informed by John C. Youngman, Jr., Esq. (the Appellant before the Third Circuit Court of Appeals in the Bender case) that he had a phone conversation with Samuel E. Ericsson, Esq. concerning the motion for a "stay of the mandate" and in response to Mr. Youngman's questions, Mr. Ericsson stated the *only purpose* in requesting the "stay of the mandate" was to enable the attorneys to prepare and file a Petition for a Writ of Certiorari by the Supreme Court and that there was *no other purpose* in requesting the "stay". Mr. Youngman, in reliance upon these assurances, chose not to oppose the motion for the "stay".

If you believe my understanding of the law relating to "stay of the mandate" as outlined above is incorrect, please supply me with appropriate citations. Upon receipt of any such citations I shall review them and if

convinced I am in error will reconsider my position in this regard.

With respect to the Equal Access Act, it must follow that *if* the *law*, constitutionally, is as stated by the Third Circuit Court of Appeals in its opinion relating to Petros, then the Equal Access Act must also be unconstitutional insofar as it may be interpreted to require the District to permit Petros to meet during the activity period.

Aside from the Constitutional consideration (which, as just stated, I believe completely controls the situation here), it appears that the Equal Access Act does not, in any event, require the granting of permission for Petros to meet during the activity period because at the Williamsport Area High School this is a period of compulsory school attendance, is a period set aside only two days each week and is a period requiring the presence of staff employees who participate and advise the students. Both the School District and the State Department of Education classify this period as "instructional time". Since this period is "instructional time", it does not constitute a "limited open forum" within the definition in Section 802(b) of the Equal Access Act regardless of how the Courts may have characterized the period in the Bender case.

I have shared your letter of October 5, 1984 along with this reply with the Administration of the Williamsport Area School District and will also share the contents of both letters with the members of the Board of Directors of the Williamsport Area School District at such time as an opportunity to meet with the Board in an Executive Session shall occur. (I believe the first opportunity to do this will be following the next Board meeting scheduled for Tuesday, October 16, 1984.) Also, if my opinion should change upon review of any authorities you may cite, I shall share this with the Administration and the

School Directors and in any event will advise you as to whether or not the Board will change its position.

Very truly yours,

/s/ Nathan W. Stuart
NATHAN W. STUART
Solicitor
Williamsport Area School District

NWS/mb

c: David R. Bahl, Esq.
John C. Youngman, Jr. Esq.
Dr. Eleanor R. Patton
Dr. Oscar W. Knade
Mr. Richard F. Eberhart

APPENDIX E

THE EQUAL ACCESS ACT
TITLE VIII of Public Law 98-377

98 Stat. 98-1302 (1984)

SHORT TITLE

SEC. 801. This title may be cited as "The Equal Access Act".

DENIAL OF EQUAL ACCESS PROHIBITED

SEC. 802. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof—

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

DEFINITIONS

SEC. 803. As used in this title—

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

SEVERABILITY

SEC. 804. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby.

CONSTRUCTION

SEC. 805. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title.

Approved August 11, 1984.

Office - Supreme Court, U.S.
FILED
DEC 14 1984
ALEXANDER L. STEVAS
CLERK

No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, et al.,
Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,

BRIEF OF JOHN C. YOUNGMAN, JR., RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN C. YOUNGMAN, JR.
Counsel of Record

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the establishment clause requires the denial of permission to meet during regular school hours of compulsory attendance to a student initiated and composed group, supervised by a school teacher, meeting on school property in school rooms, and wishing to meet for religious exercise, including prayer, during the first classroom period of the day on two (2) days per week when student clubs having direct or indirect relation to the curriculum and which promote the intellectual, physical and social development of students meet.

PARTIES TO THE PROCEEDING

The Williamsport Area School District did not appeal from the judgment of the District Court. The appeal was taken by Appellee herein. However, the School District and all Defendants in the original complaint filed in this matter may be affected by this appeal.

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I. The Case of Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) is not controlling of the case at bar, since:

(A) It is factually distinguishable from the case at bar for the following reasons:

1. The education institution was a university.
2. The university had created an open forum.
3. The forum was available to a broad class of non-religious as well as religious speakers.
4. The university students had reached an age of maturity and were adults for all practical purposes, free to make decisions contrary to their home environment and training even to converting to other religions.
5. College attendance is voluntary, not compulsory.
6. No supervisor of the group was required.
7. The facilities of the university were open to groups and speakers of all kinds.

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8. All costs were not borne by the taxpayer, but in part by student activities fees 6

(B) This Court by its denial of certiorari in the case of Jaffree v. Board of School Commissioners, 705 F2d 1526 (11th Circuit 1983), cert. denied, 104 S.Ct. 1707 (1984) and by its refusal to grant certiorari in the case of Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F2d 1038, reh. denied, 680 F2d 424 (5th Circuit 1982), cert. denied, 103 S.Ct. 800 (1983) has already indicated that Widmar v. Vincent is not controlling at the case at bar 9

II. All appellate courts, both federal and state, which have considered the problem of student initiated public high school religious clubs have uniformly held that the establishment clause prohibits such activity..... 10

III. The Equal Access Act has no applicability in the case at bar since (A) all facts and actions in the case at bar occurred prior to the passage of the Equal Access Act, (B) no record has been made concerning the application of the Equal Access Act, (C) the Equal Access Act is not applicable to the case at bar even if the record were made during a time relevant to the Equal Access Act and (D) the Equal Access Act

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NO. 84-773

MICHAEL BENDER, et al.,
Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTER STATEMENT OF CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Appellee agrees that the First Amendment to the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or of abridging the freedom of speech . . .

is involved in this case.

Appellee does not agree that the Equal Access Act, Title VIII of Public Law 98-377 enacted on August 11, 1984, is applicable to this case.

COUNTER STATEMENT OF THE CASE

The facts as stated in the Opinion of the Court of Appeals at App. 4-10 inclusive, more accurately describe the facts applicable to this case and are

incorporated herein by reference as part of Appellee's Counter Statement of the Case.

Appellants attempt in their brief at Pages 2 and 6 to emphasize the physical "isolation" of the school and that an offer of off-campus released time as "an empty offer," because there would be no "independent transportation" is not so in the view of Appellee. First, students may drive by special permission or their parents may drive them (J.A.246). Second, while it is approximately a 3/4 mile walk from the beginning of the campus to the school building and the nearest residence to the school buildings is approximately one (1) mile away, the nearest church is approximately 1½ miles from the school buildings and approximately ½ mile from the beginning of the school campus. Third, while it is true that the school district does cover a fairly large area although the joint appendix does not place that at 100 square miles as stated in Appellants' Brief at Page 2, the vast majority of the students reside within the city limits of Williamsport as physically does 98% of the school campus (J.A.248).

The Williamsport Area High School comprises grades 9 through 12 (J.A.249). The ages generally of students in grades 9 through 12 of a public high school are 14 through 18 (Judicial Notice). In fact, the original proposal by the group to the superintendent of schools was that the group would "read some scriptures and pray to God that he might edify our minds" (J.A.83). The final proposal also stated that the meetings of the organization would be supervised by a faculty advisor and student attendance would be verified by the signing of a roster (J.A.87).

The activity periods at the high school are regularly scheduled times during the school day which occur between 7:57 a.m. and 8:27 a.m., usually on Tuesdays and Thursdays of each week (J.A.365), although any day of the week can and has been

designated as an "activity day" (J.A.365). Activities or clubs that have been and would be approved are those which promote the intellectual, physical and social development of students. The current student activities so sponsored by the school district are:

Student Government
Key Club
Class Organizations (student class officers and executive board)
Library
Business English Club
Future Homemakers of America
Vo-Tech Club
Speech and Drama Club
Ecology Club
The Cherry & White (student literary art magazine)
Billtown Banner (student newspaper)
La Memoire (student yearbook)
Band (concert and marching bands)
Choir

Among the activities and clubs which have existed in the past and which could be renewed if student interest warrants are: Archery, Art, Audubon, Aviation, Chemistry, Chess, Field, Forest and Stream, Future Nurses and Future Teacher clubs. Others include the Bowling, German, Poetry, Photography and Ski clubs (J.A.366,367).

All of the clubs have faculty advisors or monitors assigned to them (J.A.366). The faculty advisors have not been instructed not to participate in the student clubs and activities (J.A.266). The proposal for the club in the case at the bar did state that the group would be interdenominational (J.A.87), although the nature of the organization according to the proposal was that it would be a nondenominational prayer fellowship (J.A.87).

The statement appearing on Page 8 of Appellants' Petition that "no students at the school believed that the meetings were 'school sponsored,'" and there was no devisiveness stemming from the meetings based on a newspaper article in the New York Times which involved an interview with several students does not and should not be substituted for the record in this case. First, such interviewing is by no means comprehensive or necessarily representative of feelings of other students in the school. Second, the statement in the article, "but at the Williamsport High School, by all accounts there has been no hint of pressure for students to join PETROS" is directly contradicted by a statement which appeared in the local newspaper, The Williamsport Sun-Gazette, on June 4, 1983 (within 7 days before the appeal was taken in this matter from the decision of the District Court) by Appellants' counsel, Gerald Seevers (whose children were and are members of the PETROS group) regarding what he would expect with regard to proselytization. The article is quoted in part as follows:

> Other students in the school 'have the right to be left alone,' and not be pressured to join a religious group. That is how the superintendent sees the law.
>
> Gerald W. Seevers, attorney for the group and father of one of the members, does not see the court ruling as intended to be so limited.
>
> Conceding that 'the club as a group is not entitled to proselytize,' Seevers said the school district 'can't limit individual members from talking about their faith to other students, and if they do, they'll find themselves back in court.'
>
> 'Children in my church are taught to try to convert others, and I would expect them to do so,' he said.
>
> Seevers went on to say, 'I'm not worried about losing a battle, however. I know God is still on his throne and I have already won the war.'

Moreover, if pressure has not been exerted, it may well be because this case has not yet been finally decided.

SUMMARY OF ARGUMENT

The holding of the Third Circuit Court of Appeals in this matter does not conflict with the holding in the case of Widmar v. Vincent. Not only are there factual distinctions of the educational institution being a university, the forum having some 100 different groups, the maturity of university students as opposed to high school students, the forum being available to religious as well as non-religious speakers and running the gamut of political expression as opposed to the situation at Williamsport High School, the voluntary nature of attendance at college, the unsupervised group and costs being paid in part by student activities fees, but the denial of certiorari by this Court in the cases of Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F2d 1038, reh. denied, 680 F2d 424 (5th Circuit 1982), cer. denied, 103 S.Ct. 800 (1983) and Jaffree v. Board of School Commissioners, 705 F2d 1526 (11th Circuit, 1983), cert. denied, 104 S.Ct. 1707 (1984) indicate that this Court does not see Widmar as controlling in the case at bar.

Contrary to Appellants' assertion, there is no confusion existing among the appellate courts which have considered this matter with respect to student initiated religious clubs meeting for religious exercise during the school day on school property. The reversal of the District Court Opinion in this case (which in Appellants' Brief) has been cured by the Third Circuit's reversal in this case.

The Equal Access Act has no applicability to this case, because it was passed after this case had been decided by the Court of Appeals for the Third Circuit. Whatever applicability such Act might have to a similar set of facts should be developed by an

independent record in which problems peculiar to the Equal Access Act have an opportunity to be fully developed and argued. Finally, the Equal Access Act could not be applied constitutionally to the case at bar if the decision of the Third Circuit Court of Appeals is correct.

REASONS FOR DENYING THE WRIT

I. The case of Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) is not controlling of the case at bar, since:

A. It is factually distinguishable from the case at bar for the following reasons:

1. The educational institution was a university.

2. The university has created an open forum.

3. The forum was available to a broad class of non-religious as well as religious speakers.

4. The university students had reached an age of maturity and were adults for all practical purposes, free to make decisions contrary to their home environment and training even to converting to other religions.

5. College attendance is voluntary, not compulsory.

6. No supervisor of the group was required.

7. The facilities of the university were open to groups and speakers of all kinds.

8. All costs were not borne by the taxpayer, but in part by student activities fees.

The eight distinctions above set forth are all factual distinctions and have been discussed in the various Appellate cases dealing most closely with the issue in the case at bar. The cases in addition to the Third Circuit Court of Appeals Opinion in this

case are Johnson v. Huntington Beach Union High School District, 137 Cal.Rptr. 43, 68 Cal.App. 3d 1, cert. denied, 434 U.S. 877 (1977); Brandon v. Board of Education of Guilderland Central Schools, 635 F2d 971 (2d Circuit 1980), cert. denied, 454 U.S. 1123 (1981), reh. denied, 455 U.S. 983 (1982) and Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F2d 1038, reh. denied, 680 F2d 424 (5th Circuit 1982), cert. denied, 103 S.Ct. 800 (1983).

Appellee disagrees with that part of the Third Circuit Court of Appeals Opinion in this case which concludes that a limited open forum was created in the case at bar.

Both the Brandon and Lubbock cases, supra, dealt with the open forum concept in the high school setting and held that the existence of clubs in such a setting does not create a limited open forum. It is interesting to note that certiorari in the Lubbock case was denied after the Widmar case came down, an indication that the Supreme Court of the United States does not go along with the concept that clubs in the high school setting constitute a limited open forum.

A line of cases has held that the university situation does constitute an open forum. These cases are Healy v. James, 408 U.S. 169, 92 S.Ct. 2338, Gay Lib v. University of Missouri, 558 F2d 848 (C.A. 8, 1977), cert. denied, 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789 (1978); Keegan v. University of Delaware, 349 A2d 14 (Delaware 1975), cert. denied, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 342 (1976). Additionally, the tradition with universities has been to allow religious groups to exist in their midst. See, e.g., Justice Brennan's Concurring Opinion in The School District of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). The Widmar case is the latest in this line of university cases which grant access to

religious groups in the university setting. The basis for this holding is that the university is the forum where ideas are explored, considered and dealt with. The students are mature enough at that age to deal with such ideas.

However, no appellate court thus far has stated that such maturity and ability to deal with religious problems exist at the high school level. Even the Eighth Circuit in Chess v. Widmar stated that the university situation was different from the high school situation (see 635 F2d 1310 at Page 1319), and distinguished the Brandon case, supra, on just such a basis. The Widmar court itself in Footnote 14 of the Opinion, 102 S.Ct. 269, 276 stated, "University students are of course young adults. They are less impressionable than younger students and should be able to apprehend that the university's policy is one of neutrality towards religion." This Court is asked to take judicial notice that in fact the age group 14 through 18 may be the most impressionable time of a person's life with regard to peer pressure. The Brandon court put the matter very well when it stated, 635 F2d 971, at 978, "an adolescent may perceive 'voluntary' school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the 'captive audience' setting of a school." It is Appellee's experience, as a parent, as a school director, and as a person with an interest in religion that peer pressure for the 14 through 18 age group is great indeed, and that while there may be some students who could distinguish between state neutrality and state advancement of religion, there are many, many students in such age group who simply do not so distinguish for any number of reasons.

While the Third Circuit Court of Appeals concluded that a limited open forum had been created in the case at bar, a contrary conclusion by this

Court would not disturb the holding in the case at bar that the activity is constitutionally prohibited. Thus, while the Appellee believes that a limited open forum was not created in the case at bar, granting certiorari to consider the propriety of such a conclusion in the case at bar would not disturb the holding of the court below. Thus, certiorari should be denied.

B. This Court by its denial of certiorari in the case of Jaffree v. Board of School Commissioners, 705 F2d 1526 (11th Circuit, 1983), cert. denied, 104 S.Ct. 1707 (1984) and by its refusal to grant certiorari in the case of Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F2d 1038, reh. denied, 680 F2d 424 (5th Circuit 1982), cert. denied, 103 S.Ct. 800 (1983) has already indicated that Widmar v. Vincent is not controlling in the case at bar.

This Court denied certiorari in the case of Jaffree v. Board of School Commissioners, 705 F2d 1526 (11th Circuit 1983), cert. denied, 104 S.Ct. 1707. Included in this case were the non-statutory and non-school board policy prayer activities issue as being unconstitutional because in violation of the establishment clause. The Eleventh Circuit Court of Appeals rejected the notion that simply because there was no statute or written school board policy authorizing the activity, the activity was therefore constitutional. Instead, the Court reasoned with Justice Douglas' concurring opinion in the case of The School District of Abington Township v. Schempp, 374 U.S. 203; 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) that if a statute authorizing the activity would be unconstitutional then the activities in the absence of a statute are also unconstitutional. This line of reasoning reaches back to the time of the Schempp case, supra, in 1963 and was enunciated also in the case of Murray v. Curlett, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) and Engel v.

Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). Unless this line of reasoning is no longer valid, it is submitted that this Court's decision not to grant certiorari in the case of Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F2d 1038, reh. denied, 680 F2d 424 (5th Circuit 1982), cert. denied, 103 S.Ct. 800 (1983) is an indication that this Court should not consider the case of Widmar v. Vincent, supra, controlling of the case at bar, inasmuch that if the Widmar case is not controlling in a situation where there is a school board policy allowing a student initiated prayer activity, the same should also hold true where there is no such written policy, but the activity is carried on anyway. The carrying on of the club activities as part of the regular school day and the approval of the various activities by the school district is state action just as much as if there were a written school board policy allowing such activity to be initiated as in the Lubbock case, supra. If Widmar did not control Lubbock, it should not control the case at bar.

II. All appellate courts, both federal and state, which have considered the problem of student initiated religious prayer groups in the public high school have uniformly held that the establishment clause prohibits such activity.

Appellants argue that there is confusion among lower federal courts and school administrators as to whether student initiated prayer groups in public schools are constitutionally permissible. The case law cited by Appellants for this proposition is very sparse. With the exception of the District Court in the case at bar and the case of Reed v. Van Hoven, 237 F.Supp. 48 (Western District, Michigan 1965), all of the cases cited by Appellants in their second argument hold that the activity was unconstitutional. The confusion seems to be limited at present to the Middle District of Pennsylvania, and this has been cleared up by the holding of the Third Circuit

Court of Appeals in the case at bar. It is submitted that a denial of the writ of certiorari in the case at bar would clear up any confusion presently existing in this area and would in fact allow all of the appellate courts which thus far have decided this matter to remain in harmony. It is submitted that the case at bar is not as close a case for the unconstitutionality of the activities proscribed as the cases of Brandon v. Board of Education of Guilderland Central Schools, 635 F2d 971 (2nd Circuit 1980), cert. denied, 454 U.S. 1123 (1981), reh. denied, 455 U.S. 983 (1982), Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F2d 1038, reh. denied, 680 F2d 424 (5th Circuit 1982), cert. denied, 103 S.Ct. 800 (1983) and Johnson v. Huntington Beach Union High School District, 137 Cal.Rptr. 43, 68 Cal.App. 3d 1, cert. denied, 434 U.S. 877 (1977). Inasmuch as the Brandon and Lubbock cases involved before and after school activities rather than activities conducted during the regular school day when pupils are present in the school buildings by compulsion and not by choice they are more difficult cases than the case at bar. The Johnson case involved the school lunch hour and therefore is more nearly on point with the case at bar than the cases of Brandon and Lubbock, supra. Thus, it is submitted that granting certiorari in the case at bar may actually cause more confusion than it dispels.

III. The Equal Access Act has no applicability in the case at bar since (A) all facts and actions in the case at bar occurred prior to the passage of the Equal Access Act, (B) no record has been made concerning the application of the Equal Access Act, (C) the Equal Access Act is not applicable to the case at bar even if the record were made during a time relevant to the Equal Access Act and (D) the Equal Access Act cannot override the First Amendment of the United States Constitution.

Whatever the congressional objective of the Equal Access Act, the facts upon which the case at bar is based all occurred prior to the passage of the Act. (The Act was passed on August 11, 1984, in an election year, and the Petition for Rehearing before the Court of Appeals in the case at bar was denied on August 15, 1984.) Every other fact and action occurring in the case at bar occurred prior to August 11, 1984, with the exception that this Petition for Certiorari, which was filed on November 13, 1984. In addition, the record in this case was developed without the Equal Access Act in mind and, therefore, the Act's provisions as applicable to the fact situation in the case at bar have never been developed or argued. Unless this Court is now going to assume original jurisdiction of such Act as applicable to the case at bar, the contention that the Act is somehow relevant to this case not only is not in accord with this Court's method of dealing with the development of issues, but would frustrate the judicial process, which is based upon the sound and deliberate making of a record and the careful and deliberate review thereof by Courts of Appeal prior to hearing before the Supreme Court. This Court should not frustrate the judicial process by an attempt to inject a Statute passed since the appeal was decided in the case at bar by the Circuit Court of Appeals.

There are many issues to be considered with respect to the Equal Access Act. For instance, as applied to the case at bar, would the activity period by non-instructional time as defined by the Act? In the Williamsport School District, for example, remedial reading instruction occurs at the same time that the activity period occurs at the high school. Furthermore, the Pennsylvania State Education Code provides that the school board may determine when the class day begins and ends, and the same state statute provides that there must be a school year containing a minimum of 990 hours of instruction at the secondary level as the equivalent of 180 school

days. 24 P.S. §15-1504. The Pennsylvania State Department of Education has determined in Basic Education Circular 3-84 dated July 1, 1984, that activities which may be counted as pupil instruction time are "Clubs, Student Councils and similar activities conducted during school hours." If also there is classroom instruction being held at the same time as the activity period is being held, is this considered instructional time or non-instructional time for purposes of the Equal Access Act? This is important in determining the question of whether a school district has created a limited open forum for purposes of the Equal Access Act.

The above is not meant to limit the number of questions of interpretation of the Equal Access Act that undoubtedly will arise as the Act and its effect on public high schools is litigated. It is to say, however, that the Act should not be invoked by these Appellants at this juncture of the case at bar in order to obtain review by the Supreme Court of the United States.

Finally, even assuming that the Equal Access Act applies to the case at bar, the Act could not withstand constitutional muster if it provided for an unconstitutional activity violating the First Amendment of the United States Constitution. Thus, this Court should disregard the Equal Access Act for purposes of determining whether certiorari should be granted in the case at bar.

CONCLUSION

Wherefore, Appellee requests Your Honorable Court to deny the Petition for Writ of Certiorari in the case at bar.

Respectfully submitted,

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No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to the UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT and BRIEF IN SUPPORT OF MOTION

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December 4, 1984

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-773

MICHAEL BENDER, et al.,
v.
THE WILLIAMSPORT AREA SCHOOL DISTRICT, et al.

MOTION OF NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

In accordance with Rule 36 of the Supreme Court of the United States, the National Association of Secondary School Principals (NASSP) by its attorney, respectfully petitions the Court for leave to file a brief amicus curiae in support of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit in the above titled action.

This motion is made because the question presented in this case involves an important legal issue affecting public education throughout the United States, and an issue which has been the subject of considerable disagreement, if not actual confusion, in the lower courts.

The issue is whether the Establishment Clause of the First Amendment of the United States Constitution requires the denial of equal access to a small group of high school students who wish to meet on public school property, outside of regular instructional hours for the purpose of conducting group prayer or other religious activities.

Thus far, three U.S. Courts of Appeal have ruled that such activity is not permissible under the Establishment Clause, but numerous federal district courts and state legislatures have thought other-

wise, and in the second session of its 98th Congress, both Houses of the United States Congress passed, and the President of the United States signed, legislation which would not only permit, but would direct, public high schools to permit such activity.

While the parties have not given their consent to the filing of this motion and brief, because of the importance of the issues here presented, the NASSP humbly urges their acceptance.

Respectfully submitted,

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December 4, 1984

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

INTERESTS OF AMICUS CURIAE

The National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 35,000 administrators of public and private secondary schools throughout the United States. NASSP was organized in 1916 to provide a spokesman for secondary school administrators and the formulation of all aspects of educational policy in the United States, and to improve programs for students enrolled

in the schools. Although NASSP customarily does not seek to intervene in private litigation, it believes that this case involves issues of such fundamental importance as to make an expression of its views essential.

The NASSP is committed to the improvement and strengthening of secondary education. It seeks to be responsive to changes both in school environment and in the role of education in society. For these reasons it works with many other organizations, private as well as public to promote research and development designed to strengthen both the instructional programs and management of the public schools. It is out of this background of experience and concern that the NASSP presumes to enter this case as amicus curiae to aid in securing fair and full consideration of the issues it presents.

SUMMARY OF FACTS and HISTORY OF THE CASE

The facts of the case have never been in dispute by the parties, and we will assume they are essentially as stated in the opinions of the Third Circuit of the United States Court of Appeals, and the Federal District Court for the Middle District of Pennsylvania.

In essence, these facts present a situation in which a small group of students desired to form a club, to be called "Petros" which would meet in some kind of organized manner in a classroom of the Williamsport, Pennsylvania, High School during a 30-minute period prior to the regular instructional period, this period being set aside on certain days of the week for students to attend and participate in extra-curricular clubs and activities of

their choice. Initially, the principal granted permission to the club's organizers, although he advised them they could not publicize its meetings by using the public address system or bulletin boards.

Sometime after the first meeting of Petros was held, the principal reconsidered his decision, and advised the students that they could not hold any more meetings of their group until he received approval from the superintendent and the school's attorney. Shortly thereafter, the students were advised in a letter from the superintendent that it would be "legally improper for a school district to approve or endorse" religiously oriented student meetings of the kind represented by Petros, at least until the superintendent received

advice to the contrary from the school's legal counsel. After careful consideration of additional information submitted by the students, counsel issued a written opinion concluding that the First Amendment would not permit the student group to meet during the activity period.

Following an appeal to the board which upheld the superintendent's position, this suit followed, and both superintendent and principal found themselves named as defendants along with the board and the district itself, despite the fact that in its denial of the students' appeal, the president of the board made clear that neither the board nor any administrative officer of the district regarded the proposed group as being "unworthy" but only that "present law simply does not permit public schools to authorize or support religious activities on school property."

The principal legal issue presented to the courts below, and now to this Court, is whether the school district's understanding of the First Amendment is correct. The Federal District Court for the Middle District of Pennsylvania ruled by summary judgment in favor of the students that the school district's position was wrong. An appeal was made by one defendant, then a member of the school board, and a three judge panel of the United States Court of Appeals, Third Circuit, disagreed with the reasoning of the lower court, and reversed its decision. Following denial by the Third Circuit of the students' petition for rehearing by the panel or for rehearing en banc, the present petition for review was filed.

ARGUMENT IN SUPPORT OF PETITION

As noted in the summary of the facts and history of the case above, this dispute occurred and has continued not because of any

real opposition by most of the defendants to the actions or desires of the student plaintiffs. Certainly the principal, superintendent and school board president have, at various times, made clear their sympathy with the student plaintiffs. Refusal to permit the student meetings was based solely upon the administrators' understanding of the law relating to the Establishment Clause of the First Amendment, and this understanding was in turn based on advice of the school district's counsel. Unfortunately, the validity of this position is subject to considerable question as evidenced by the subsequent disagreement between the district court and the court of appeals in this case, as well as by the opinions of a number of other courts which have reviewed this and related questions in recent years.

We believe that both the plaintiff students and the school defendants have

good and adequate reasons to believe in the correctness of their legal positions. The NASSP is not committed to either legal position, but sincerely believes that an issue of much importance and concern to so many people throughout our country can only be resolved by a clear determination by this Court. The present situation is unfair both to students desiring to exercise what they believe to be their constitutional rights, and to school administrators and board members seeking to preserve and uphold the United States Constitution, and to carry out their official duties.

It is particularly unfair to our members, the principals and other local site administrators of the public schools that they should be required to make decisions in good faith and under advice of counsel which nevertheless subject them to legal challenge and all of the burdens connected therewith. In regard to the present situa-

tion, the principals may well be exposed to suit regardless of which way they decide. The impossibility of this situation has now been intensified by the enactment and passage of the so-called Equal Access Act by the U.S. Congress. (Title VII of Public Law 98-377, 98 Stat. 1302 [1984]).

It is therefore not the concern of NASSP that the issue presented in the case at bar be decided in favor of one or the other of the parties, but only that it be decided by this Court in a manner that resolves the questions presented for the guidance of all of the country's federal courts and for the many citizens, administrators and students alike who share the concerns of the parties here involved.

To this extent, at least, we would concur with the arguments presented by petitioners to this Court headed "Reasons for Granting the Writ" (pages 20-28). As there stated, regardless of which party

is right, the existing uncertainty on the issue involved in this case is confusing to school administrators, and subjects them unfairly to a variety of pressures coming from different directions. In responding to these pressures without adequate guidance from the courts, different school districts and their administrators necessarily exacerbate the situation by making conflicting decisions which can only increase the confusion in which all must flounder.

As we view it, the following are at least some of the issues which require resolution, and which are raised in this case:

1. Does the Establishment Clause preclude all student group activity of a religious nature in a public high school, even if such activity is voluntary, and student initiated?

If so, what is the basis of the pro-

hibition in terms of the three-part test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971) -- purpose, primary effect, or entanglement?

2. If some student group religious activity is permissible in a public high school, as this Court suggested it is at the college level, (Widmar v. Vincent, 454 U.S. 263 [1981]), what are the parameters of such permissible activity?

3. Even if the Establishment Clause would otherwise preclude student group religious activity in public high schools, does the equivalent First Amendment right of freedom of expression overcome this preclusion under the doctrine that a "limited open forum" has been created if school authorities give every other kind of student group the opportunity to meet on school property during a non-instructional period?

This is apparently the position adopted by the federal district court in the case

at bar (Bender v. Williamsport Area School District, 563 F. Supp. 697, 714 and 716, [M.D. Pa.] 1983) and the assumption of the Congress underlying its enactment of the Equal Access Act.

We are aware that the demands placed upon this Court are heavy, and that the number of petitioners for review far exceed the number which the Court can accept. As noted by petitioners in this case, however, the Court has accepted at least two cases involving religious activity on public property in the past year, neither of which has occasioned the conflict among the lower courts, nor the degree of public confusion which exists in the case at bar. (Jaffree v. Wallace, 52 U.S.L.W. 3719, U.S. April 2, 1984, No. 83.812; and McCreary v. Stone, 739 F.2d 716, (2nd Cir. 1984), cert. granted, 53 U.S.L.W. 3285, U.S. Oct. 16, 1984, No. 84-277.)

As indicated by the federal district court in the case at bar, numerous federal courts have "struggled to find a neutral course between the two Religion Clauses, both of which are cast in absoiute terms and either of which, if extended to a logical extreme, would tend to clash with the other." (Bender, 563 F. Supp. 697, 716-717.) Only the Supreme Court of the United States can define that course so as to resolve the contentious issues now wracking our public schools.

CONCLUSION

For the reasons given above, we urge that the Court grant certiorari and accept this case for review and decision.

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents.

CONSENT TO FILING

Counsel for Petitioners and Respondents have consented to the filing of the within brief by the National School Boards Association. Confirming letters will be filed with the Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

INTEREST OF THE AMICUS

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of

Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The subject of whether public schools must or may grant "equal access" to student-initiated religious organizations is a controversial one among school board members and the citizens in the communities in which their school districts are located. Because of the difference of opinion among its membership as to whether student religious groups should be allowed to meet in the public schools,

NSBA has no policy on the subject. In the event this Court grants certiorari in this case, NSBA will not file a brief on the merits.

Policy differences aside, school board members across the country need guidance from this Court as to the legal question of whether they have any discretion in this matter. As the law now stands, their only safe alternative is to cease extracurricular activities altogether in order to assure that none of the conflicting legal authorities are violated.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with the recently passed Equal Access Act, Pub. L. No. 98-377, Stat. 98-1302 (1984).

II. The decision below conflicts with other federal court decisions on the subject.

I. THE DECISION CONFLICTS WITH THE EQUAL ACCESS ACT.

On August 11, 1984, less than three weeks after the decision in the case at bar, President Reagan signed into law the Equal Access Act, Title VIII of P.L. 98-377.

That Act prohibits a recipient of federal financial assistance which has a "limited open forum" from discriminating against any secondary school students "who wish to conduct a meeting .... on the basis of the religious, political, philosophical, or other content of the speech at such meeting." Id at Sec. 1(a). A school operates a "limited open forum" if it allows "noncurriculum

related student groups to meet on school premises during noninstructional time." Id at Sec. 1.(b).

As noted above, the Equal Access Act prohibits discrimination against religious meetings if the meetings are held in a "limited public forum." That forum is present if the meetings meet the following three requirements: (1) voluntary and student-initiated; (2) noncurriculum related; and (3) held during noninstructional time. Since all three requirements are met in the instant case, the decision below conflicts with the Act.

The decision below found that, in creating the activities period, the school board created a "limited public forum" because: First, the school district left the subject matter of the

meetings entirely to the students with faculty acting only as monitors. Petition for Certiorari Appendix at 8a and 26a; Second, the board did not limit the content to curriculum related subjects, Id at 19a; and Third, the meetings were held before the beginning of class instruction, Id at 8a.

The debate on the Equal Access Act in both the House and the Senate attempted to define the third element so as to exclude Williamsport's activities period from the Act's coverage. However, given the clear language of the Act which defines "noninstructional time" as that "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends," these attempts to distinguish Williamsport cannot stand.

As was pointed out by Senator Denton, one of the sponsors of the Act:

> "[I]f the school allows noninstructional periods before or after actual classroom instruction -- which is the term used -- sometime during the day, then the school cannot discriminate against student-initiated groups who wish to meet voluntarily at that time, for example, during lunch periods, open activity periods, and in schools with staggered schedules where students are free to meet. I am willing to let that be subject to interpretation in the future. But what it says is actual classroom instruction. I have heard the term 'school day' thrown around in senatorial comment today but that is not what this bill says."

After the Act was signed by the President, the Petitioners requested the Third Circuit Court of Appeals to reconsider their decision in light of its potential conflict with the Act. The court denied that petition. Petition for Certiorari Appendix at 64a.

Amicus urges this Court, at the least, to remand this case back to the court of appeals with direction to determine whether the Equal Access Act can be distinguished from the facts here and, if not, to reconsider its decision in light of the Act.

It is unfair to school districts across the country to force them to subject themselves to liability either by allowing religious groups to meet, thereby subjecting themselves to charges of establishment of religion, or by refusing to allow them to meet and waiting for suits by student religious groups.

It should be noted that this dilemma not only implicates school districts but also has personal financial implications for individual school officials.

Students who are refused the right to meet because of an attempt to avoid charges of establishment of religion, could be awarded damages and attorneys fees, under 42 U.S.C. 1983 and 1988, against both the school board and individual school officials on the theory that the officials have deprived students of their rights guaranteed by the Equal Access Act.

II. THE DECISION CONFLICTS WITH OTHER FEDERAL COURT DECISIONS

A. Widmar v. Vincent.

Until its decision in Widmar v. Vincent, 454 U.S. 263 (1981), Supreme Court decisions on the question of prayer in the public schools were quite clear. See, eg, McCollum v. Board of Education, 333 U.S. 203 (1948) (religion classes as part of school curriculum); Engel v.

Vitale, 370 U.S. 421 (1962)(reciting in classrooms prayer written by state); Abington School District v. Schemp, 374 U.S. 203 (1963) (scripture reading and reciting Lord's Prayer in classrooms).

Prior to 1981 school boards could feel safe in denying the use of school facilities for religious meetings, even if other student groups were allowed to meet.

After Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) held that students have a free speech right in the classroom and Widmar v. Vincent, supra, held that religious speech is equally protected by the first amendment, school officials became more uncertain as to their obligations with regard to the use of school facilities by religious groups.

Although courts have distinguished Widmar on the basis of an "impressionable child" theory or for other reasons, nevertheless Widmar remains to support the Congress in its passage of the Equal Access Act and to support lawsuits by religious groups which continue to urge the opening of schools to their meetings.

B. Federal circuit decisions do not resolve the present issue.

Courts that have reached decisions contrary to Widmar, supra, have done so on the basis of three different rationales: 1) the presence of a religious purpose; 2) the absence of a public forum in public secondary schools; and 3) the impressionability of pre-college age students.

1. The presence of a religious purpose.

In Lubbock Civil Liberties Union v. Lubbock Independent School District, 669

F.2d 1038, reh'g. denied, 680 F.2d 424 (5th Cir. 1982), cert. denied, 103 S.Ct. 800 (1983), the Fifth Circuit found an establishment of religion because the board policy allowing students to gather before and after school for a variety of purposes, including religious ones, was designed to bring religion into the schools. The court noted that the Lubbock School District had engaged in certain religious practices such as scripture reading over the public address system, teacher led classroom prayer and Bible distribution since 1971. Thus, the court found that the policy failed the first test, i.e., secular purpose, of the three prong analysis established in Lemon v. Kurtzman, 403 U.S. 602 (1971).

Recently the Eleventh Circuit pointed to the school district's overall

practice of supporting religious activities such as religious assemblies and signs and announcements of church sponsored events as an important consideration in upholding the trial court's grant of a preliminary injunction prohibiting the district from permitting a student religious group to meet on school property after school hours under faculty supervision. Nartowicz v. Clayton County School District, 736 F.2d 646 (11th Cir. 1984). The court cautioned, however, that in evaluating the application for a permanent injunction, the district court should assess whether the district has an "equal access" policy, the extent of faculty sponsorship and other factors relating to the creation of a perception in the minds of the students that the school district is either "supporting" or merely "accommodating" religion.

Clearly, the presence of a religious purpose does not apply in the instant case, there being no contention that the Williamsport School District has a history of supporting religion that would taint a policy to allow student religious groups to meet. If Williamsport School District were to adopt such a policy, it would most certainly satisfy the first part of the Lemon test. Thus this distinction cannot serve as a basis for resolving the conflict created between the Third Circuit's decision and the Equal Access Act and this Court's ruling in Widmar.

2. Absence of a public forum.

The Fifth Circuit in Lubbock, supra, and the Second Circuit in Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980), cert. denied 454 U.S. 1154 (1981),

reh'g. denied, 455 U.S. 983 (1982), held that the freedom of speech does not protect the right of student religious groups to meet on school premises. Thecourt in Brandon, decided prior to Widmar, supra, that public schools were not public forums available for the airing of religious doctrines. Even after Widmar, courts have had no difficulty in finding sufficient differences between high schools and colleges to justify prohibiting equal access to religious groups desiring to meet on public school property. Lubbock, supra.

Now, in the appellate court's decision in Williamsport, the Third Circuit has held that a public school can be a "limited public forum" and that to discriminate against a student group in

that forum because of the content of their speech, does raise free speech implications. Clearly, on this issue alone, a conflict has emerged between thecircuits which only this Court can resolve.

While the lower court opinion in this regard appears to be consonant with the congressional mandate in the Equal Access Act, any illusion of harmony between the legislative directive and judicial precedent dissolves in the court's holding that the establishment clause considerations outweigh the students' free speech rights and therefore, the school may constitutionally discriminate against religious groups.

3. Impressionability of school children.

As pointed out by Petitioner, the

decision below is not the first to carve out an exception to Widmar v. Vincent, supra, by holding that secondary school students unlike college students, are impressionable and unable to understand that a school board that allows religious clubs to meet in the school is not necessarily by that action endorsing the religious club. See, e.g., Lubbock, supra; Brandon, supra.

The lower court analyzed the facts at bar in light of the three-part test in Lemon v. Kurtzman, supra. It held that although there was a secular purpose in establishing the activities period, the "primary effect" of allowing religious groups to meet during that time would enhance religion. The court based its finding entirely on a belief that

secondary school students are impressionable and that the board would send a "message of government endorsement of religion" by permitting student religious groups to meet in the school.

On the issue of whether the impressionability of secondary age students should give rise to a different first amendment standard in determining whether a public forum exists, even the decisions of this Court may raise conflicting signals for school boards. For example, the decision below cites Board of Education v. Pico, 102 S.Ct. 2799 (1982) in support of its contention that Widmar does not apply at the secondary level, because at that level "emphasis is placed more on a structured program 'for inculcating fundamental values necessary to the maintenance of a

democratic political system.'" Petition for Certiorari Appendix at 17a.

However, the plurality opinion in Pico distinguished between first amendment constraints in the classroom where the school board could be said to have "unfettered discretion to inculcate community values" through the selection of textbooks, and the school library which is completely voluntary and where the choice of books is "entirely a matter of free choice" of the students. Board of Education v. Pico, supra at 2809. Although no definitive principles were annunciated in Pico, there is certainly support in the plurality opinion for the proposition that the "impressionability" standard does not apply outside the classroom, where students are engaged in purely voluntary activities.

While the circuit court decisions on equal access seem consistent in result, i.e. in upholding the refusal of school districts to grant permission to student religious groups to meet on public school premises, there in fact exist significant differences that warrant definitive resolution by this Court. In the instant case, the lower court emphasized that the "activities period" at issue occurred during the time when students are required to be in school. Petition for Certiorari at 28a and 43a, footnote 30.

Careful analysis of the decision indicates that it might have been different had the activities period been held before the school day begins. Other cases, however, have held the establishment clause to be implicated even when the religious meetings are held

before the school day begins. See, e.g., Brandon v. Board of Education of Guilderland Central Schools, supra. As indicated above, the Equal Access Act has done nothing to resolve this question, and may in fact only add legislative confusion to the judicial fray.

Perhaps more importantly, the lower court decision here, unlike the other cases finding establishment clause violations, recognizes a valid free speech right in permitting student religious groups to meet on public school property. Neither Brandon nor Lubbock, supra, confronted this Court with such a direct clash between the first amendment right to free speech and the constitutional prohibition against state establishment of religion. That this Court settle this confrontation has

become more urgent since the passage of the Equal Access Act.

CONCLUSION

School boards and school administrators are becoming used to treading narrow legal lines where the state of the law is less than clear. Through an excess of caution they can usually obey the law while accomplishing their educational mission. Here that may be impossible. Even were the case law completely clear, now that the Congress has passed a law enunciating a federal right, school people cannot defend a suit by a religious group which has been refused the right to meet on school grounds on the basis that extant case law prohibits that action. They must decide whether to risk violating the federal

statute, and thus risk a judgment for damages and attorneys' fees under 42 U.S.C. 1983 and 1988 or to comply with the statute and risk an injunction because of a court finding of an establishment of religion violation.

Whereas in the past religious groups may have been reluctant to file suits given the weight of the case law against them, the passage of the Equal Access Act may encourage them to file suit where school boards continue to follow judicial precedent. Until this Court definitively decides this issue or at least remands the case to the Third Circuit Court of Appeals for its reconsideration in light of the Equal Access Act, the law will

remain unclear to the benefit of no one, except perhaps attorneys.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a public high school violates the Establishment Clause if it permits a voluntary student religious club to meet on school property during a student activities period in which all other voluntary student groups are permitted to meet.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The question in this case is whether the First Amendment requires a public high school to exclude a voluntary student religious club from meeting on school property during a student activities period in which all other voluntary student groups are permitted to meet. The interest of the United States arises from the fact that Congress has recently addressed the issue.

After extensive hearings and debate, the Equal Access Act (Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.*) (set forth in full at Pet. App. 113a-115a) was passed by the House of Representatives (by a 337-77 vote) and the Senate (by an 88-11 vote), and signed by the President on August 11, 1984. The Act makes it unlawful for any public secondary school receiving federal aid and having a "limited open forum" to deny access to students who wish to conduct a meeting, on the basis of "the religious, political, philosophical, or other content of the speech at such meetings." "Limited open forum" is defined as granting access for noncurriculum-related student

groups to meet on school premises "during noninstructional time," which is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." The school "is deemed to offer a fair opportunity to students" if it provides, on a uniform basis, that meetings be "voluntary and student-initiated"; that there be "no sponsorship of the meeting by the school"; that "employees or agents of the school or government [may be] present at religious meetings only in a nonparticipatory capacity"; and that "non-school persons may not direct, conduct, control, or regularly attend" such meetings. §§ 802, 803, 98 Stat. 1302, 1303.

The court of appeals held, by a divided vote, that a public high school would violate the Establishment Clause by allowing a voluntary religious club to meet on school premises during a student activities period. If allowed to stand, the decision of the court of appeals would cast doubt on the constitutionality of the Equal Access Act, and would frustrate the congressional objective of resolving the constitutional issue with a minimum of additional, costly litigation. See S. Rep. 98-357, 98th Cong., 2d Sess. 12, 21 (1984).[1]

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[1] One State Attorney General, in reliance on the decision below, has formally opined that the Equal Access Act is unconstitutional, and has, in effect, instructed State educational officials not to comply with it. 69 Op. Md. Att'y Gen. No. 84-031 (Dec. 6, 1984). The American Association of School Administrators has distributed guidelines for implementing the Equal Access Act, which are prefaced by the advice that states covered by the Third Circuit (among others) "could be out of compliance with previous circuit court rulings if they act to implement the law." American Association of School Administrators, *Equal Access: Interpretation and Implementation Guidelines* 1 (1984). These examples demonstrate that the decision below is having a direct effect on implementation of the Act.

The court below relied principally on its perception that high school students are not sufficiently mature to understand that granting religious groups equal access would not constitute school endorsement of religion—a view expressly investigated, and rejected, by Congress in its factfinding capacity (*id.* at 9-10, 34-35). Other factors relied on by the court below are also likely to be present in cases covered by the Equal Access Act, including the use of school premises for meetings and the presence of adult monitors.[2] If the court of appeals' reasoning is accepted, most situations covered by the Equal Access Act might also be viewed as constituting an official endorsement of religion.

STATEMENT

1. Williamsport Area High School is located on a 147-acre campus, more than a mile from the nearest residence (C.A. App. A239, A248-A249). Most students are bused to the school (*id.* at A246). The school day starts at 7:45 a.m., with a 12-minute homeroom period, during which attendance is taken and announcements made (*id.* at A365).

On Tuesdays and Thursdays, the opening homeroom period is followed by a 30-minute period for

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[2] The court of appeals also relied in part on the fact that the activities period at the Williamsport Area High School took place during hours of compulsory school attendance for most of the students (*i.e.*, those seventeen or younger). Pet. App. 8a, 25a, 30a-31a, 42a. The Equal Access Act applies only where the student activities occur "before actual classroom instruction begins or after actual classroom instruction ends" (§ 803(4), 98 Stat. 1303). However, as this case illustrates, where the activities period occurs at the beginning of the day (or after a brief opening homeroom during which no instruction occurs), the language of the Act would appear to apply despite the fact that the activities period is covered by compulsory attendance laws. Thus in this respect as well, the decision below may conflict with applications of the Equal Access Act.

extracurricular student activities (Pet. App. 69a n.5). During this period, students may attend student club meetings, study in the library, visit the computer station, examine career or college placement materials, or stay in their homerooms (*id.* at 7a-8a). The student clubs that meet during this activities period are entirely voluntary (*id.* at 8a). There is no written policy concerning what type of club may be allowed to meet. However, the principal stated that he would permit any lawful club that would "contribute to the intellectual, physical or social development of students" (*id.* at 9a; C.A. App. A367). This principal has served since 1974; in his memory, no student club had ever been denied permission to meet, until this case (Pet. App. 8a).

This case arose out of a request by students at the school to form a club for the purpose of meeting to read and discuss the Bible and to pray. The club (called "Petros") agreed not to publicize its meetings through the school's public address system, bulletin board, or newspaper. Pet. App. 33a. The club was initially allowed to meet during the activities period. The first meeting was attended by 45 students (out of a student body of 2,500). *Id.* at 4a-6a, 68a-71a. In accordance with school policy, a teacher was present during the meeting, took attendance, and thereafter sat in the room grading papers (*id.* at 9a-10a, 69a-70a). After the first meeting, the school superintendent obtained an opinion of counsel to the effect that allowing the club to meet on school property would violate the Establishment Clause. On this basis, the superintendent denied the club further permission to meet during the activities period. The students were offered the alternative of released time during which they could conduct their meetings away from school property. *Id.* at 71a-72a. While the record does not show why they declined this alterna-

tive, it was obviously impractical in view of the location of the school (over a mile from the nearest residence) and the brief duration of the activities period (30 minutes).

The superintendent's decision was affirmed by respondent School Board (Pet. App. 72a). The Board's action was based solely on advice of counsel that "[p]resent law simply does not permit public schools to authorize or support religious activities on school property" (*id.* at 6a; C.A. App. A235). The Board has never suggested any programmatic or educational reason for excluding the group.

2. The students then brought this action for declaratory and injunctive relief against the School Board and its members, in both their individual and official capacities. Relying on *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the district court held that the high school had created a "limited public forum" by establishing an activities period open to any legitimate student activity, and rejected the Board's argument that allowing Petros to meet would violate the Establishment Clause. Since this was the only rationale for the exclusion, the district court concluded that under the First Amendment this "content-based decision to exclude subject matter" could not stand. Pet. App. 81a-82a.[3]

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[3] The district court acknowledged that if the activities period were part of the school's curriculum, the superintendent would have had wide discretion to limit subject matter as part of his power to define the curriculum. However, the court pointed out that the sole reason offered for excluding Petros was legal advice regarding the Establishment Clause; the superintendent never purported to be exercising his authority to define the curriculum. Pet. App. 82a-85a.

After the district court decision, respondent School Board decided to comply with the decision and not to appeal. Respondent John C. Youngman, Jr., a member of the Board and parent of children in the school system, appealed. A divided panel of the court of appeals reversed. While agreeing that the school had created a limited public forum in its activities period, and thus that the students had a "valid first amendment interest to engage in their proposed activity" (Pet. App. 20a-21a), the court "balanc[ed] the respective constitutional interests [free speech and nonestablishment] which would be lost and gained if Petros were granted access to the activity period" (*id.* at 42a), and concluded that "there is a greater vindication of the protections of the Constitution if the Establishment Clause prevailed in this instance" (*id.* at 43a).

As a result of the court of appeals' decision, the School Board has reverted to its former policy of denying the students the right to participate in the activities period (Pet. App. 109a-110a).[4]

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[4] There unquestionably remains a case or controversy, since the student petitioners continue to desire to meet, and the School Board continues to refuse permission. That the School Board is a nonlitigating respondent (in effect, a disinterested "stakeholder") does not affect this, since the Board (by complying with the court of appeals' judgment and by resisting attorneys' fees) has in effect treated the appeal by respondent Youngman as its own. See Pet. 8-9 n.7. Nor has the end of respondent Youngman's tenure as a Board member rendered the case moot in a technical sense as to him. The only way for him to challenge petitioners' entitlement to attorneys' fees under 42 U.S.C. 1988 was for him to appeal the underlying judgment.

These matters were brought to the attention of the court of appeals (see Pet. for Reh'g 5 n.2), which implicitly held that the case remained justiciable.

REASONS FOR GRANTING THE PETITION

I. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING A MAJOR AND RECURRING CONSTITUTIONAL ISSUE

This case raises one of the most significant and hotly-contested issues in the area of free speech and religion: whether high school students wishing to meet for purposes of voluntary, student-initiated, and student-directed religious speech must be excluded from forums within the high school otherwise available to all.

As this case illustrates, the conflict is generally not between the students and the high school authorities, but between students and a view of the law—a view that equal treatment of religious speech in the high school setting would somehow violate the Establishment Clause of the First Amendment. Here, as elsewhere, high school authorities have determined that the students would benefit from the opportunity to meet together for student-initiated, student-directed activities of their choice. C.A. App. A244, A276. The principal and school board have not sought the role of censor; they are willing to allow the students to choose their own topics of interest, including religious matters. But here, as elsewhere, the school authorities have been advised by their attorneys that they must—as a matter of constitutional law—restrict their students' activities to the non-religious. Pet. App. 66a. The result is to diminish both the liberty of the students and the discretion of the school authorities.

Conflicts such as this are increasingly frequent and should be resolved. In its recent investigation into the issue, Congress found that "many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity." S. Rep. 98-357, 98th Cong., 2d

Sess. 6 (1984); accord, H.R. Rep. 98-710, 98th Cong., 2d Sess. 3 (1984). The reason, Congress found, is not "malevolence toward religion" but the administrators' "erroneous[] belie[f] that the Establishment Clause prohibits students from engaging in such speech at all, even when other types of extracurricular student speech are permitted." S. Rep. 98-357, *supra*, at 6; accord, H.R. Rep. 98-710, *supra*, at 3, 4. The principal reason for passage of the Equal Access Act (Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.* (Pet. App. 113a-115a)) was to "clarify and confirm" the First Amendment rights of students in this context, and thereby "resolve the dilemma" faced by school administrators in reconciling the assertedly conflicting demands of free speech and nonestablishment. S. Rep. 98-357, *supra*, at 3, 21.

As the district court below stated (Pet. App. 101a), guidance from this Court is needed to resolve the issue. We believe this case is an appropriate vehicle for the Court to consider the question, for two reasons.

First, the record and the extensive factual findings of the district court present the legal issue sharply and clearly, and the thorough opinions below have fully fleshed out the relevant areas of legal dispute. Moreover, this case presents the paradigm of the "equal access" issue, without any extraneous or unusual factors (such as school administration involvement in supporting religious activities) that would cloud the issue. Cf. *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 1983).[5]

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[5] The history of prior school promotion of religious activities in *Lubbock* distinguishes that case, in which this Court denied a petition for a writ of certiorari.

Second, the congressional objective of prompt resolution of this issue is frustrated by continued uncertainty. Further exploration of the issues by the lower federal courts is not necessary; on the contrary, both student groups and school administrators would profit by a definitive answer. As the Senate Report noted, continued uncertainty is resulting in a general practice of restraint of constitutionally protected speech (S. Rep. 98-357, *supra*, at 14-15), as well as substantial expenditures of taxpayers' money on litigation (*id.* at 21).

This case did not arise under the Equal Access Act, which was passed by the Senate one day after the court of appeals rendered the judgment below. It does not, therefore, raise any issue regarding the scope or meaning of the Act. However, the Establishment Clause issues raised by this case are identical to those that will be raised by applications of the Act under similar circumstances. There is no reason for the Court to await a case filed pursuant to the Act to resolve these issues.

II. THE JUDGMENT OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISIONS PERMITTING RELIGIOUS SPEECH ON THE SAME BASIS AS OTHER SPEECH

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court held that the University of Missouri at Kansas City had created a limited public forum by making its facilities available for a broad spectrum of student groups, and that having done so, it could not close its facilities to a group wishing to engage in religious worship and discussion. The Court specifically held that permitting religiously oriented groups, among a broad spectrum of other groups, to use University facilities would not violate the Establishment Clause, because a neutral policy of equal access does not convey "any imprimatur of state approval" of religious activities (454 U.S. at 274).

However, in a footnote the Court noted that university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion" (454 U.S. at 274 n.14). Seizing on this remark, the court of appeals sought to distinguish *Widmar* on the ground that more impressionable high school students might view the school's action in allowing a religious group to meet as an official endorsement of religion, rather than as official neutrality.

We submit that neither the "impressionability" factor nor any of the other grounds proposed by the court of appeals for distinguishing *Widmar* can withstand analysis.[6] When a limited open forum has been created, whether in a public high school or in a university, the Constitution does not demand that religious groups be singled out for exclusion from it.

A. The Presumed Greater Impressionability Of High School Students Is Not A Basis For Permitting Discrimination Against Religious Groups

Judge Adams, in his dissent below, correctly stated that "there is no clear constitutional distinction based on the comparative intellectual capacities of 14-18 year olds as opposed to 18-22 year olds" (Pet. App. 48a-49a). The court of appeals has "forge[d] a constitutional principle, with all the rigidity which it invariably creates, from vague impressions of the emotional sophistication of high school students" (*id.* at 49a). The majority's "impressions" differ from the district judge's conclusion in this case (*id.* at 93a-

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[6] Indeed, in one important respect, the instant case is less troublesome than *Widmar*. Here, unlike in *Widmar*, the school authorities are willing to permit the students to meet for religious purposes, provided they can do so legally. The concerns of the dissenting opinion in *Widmar* regarding compelling the University against its will to allow the students to meet are therefore absent here.

94a), as well as from congressional findings made in connection with the recent passage of the Equal Access Act. Moreover, they are inconsistent with the view adopted by this and other courts in decisions holding that First Amendment protections of free speech apply to students below the college level.

1. In passing the Equal Access Act, Congress took issue with the notion that high school students are too impressionable to understand that the school's neutral treatment of a religious club would not constitute official endorsement of religion. The Act, which forbids public secondary schools with "limited open forums" from excluding activities on the basis of their religious content, is premised on a congressional finding that high school students are mature enough to understand the difference between school accommodation of religion and school endorsement.

The Senate Report on the legislation stated: "[t]he Committee finds that students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led, religious speech on the one hand and student-initiated, student-led, religious speech on the other." S. Rep. 98-357, *supra*, 35; see *id.* at 9-10. This "exercise of [the Committee's] fact-finding powers" (*id.* at 9) was based in part on the expert views of psychologists (*id.* at 35), and in part on the testimony of many witnesses, including high school students (*id.* at 10).[7] Supporters

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[7] For example, a high school student from Sonoma, California testified:

> They also have a smoking section in our school. Does that mean that the school sanctions, supports and encourages smoking? I doubt it, just because the school allows a group to meet, doesn't mean it approves of and supports their activities. The same should hold for religious groups.

Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary,

of the legislation in the House expressed a similar view.[8]

Where Congress has made findings of fact in the discharge of its legislative function, due regard for the separation of powers and for the ability of the legislature to gather information and analyze issues of legislative fact (see *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504-505 (1975)) requires that courts defer to congressional determinations, even for purposes of constitutional adjudication, unless those determinations can be said to be irrational. See, *e.g.*, *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532-533 (1982); *Rostker* v. *Goldberg*, 453 U.S. 57, 74, 80-83 (1981); *Minnesota* v. *Clover Leaf*

98th Cong., 1st Sess. 64 (1983) (testimony of Sarah Scanlon). Another student, from Lubbock, Texas, testified:

> Some people are worried that high school students are very impressionable, and that we can't make decisions and that we are naive. I feel that that is pretty naive on the part of the people who think that. I don't think that is true at all.

Id. at 60 (testimony of Bonnie Bailey). See also, *e.g.*, *ibid.* (testimony of Lisa Bender); *Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 39 (1983) (testimony of C. Luke Thornton, Principal of John I. Leonard High School, Lake Worth, Fla.).

[8] See, *e.g.*, 130 Cong. Rec. H7727 (daily ed. July 25, 1984) (remarks of Rep. Roukema) (disputing claim that "allowing religious groups to meet in the school under any circumstances will have the effect of advancing religion because of the impressionability of high school students" and stating that "studies of adolescent psychology * * * have shown that it is a time of increased cognitive capacity, marked by an ability of the adolescent to differentiate himself from authority figures he depended upon as a younger child"); *id.* at H7724 (remarks of Rep. Frank) ("I regard this as a very auspicious day [for] * * * those of us who think we ought not infantilize teenagers.").

Creamery Co., 449 U.S. 456, 464 (1981); *Brotherhood of Locomotive Firemen* v. *Chicago, R.I. & Pac. R.R.*, 393 U.S. 129, 136, 138-139 (1968); *Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966); *Katzenbach* v. *McClung*, 379 U.S. 294, 299-301 (1964). As Justice Harlan stated in his dissenting opinion in *Katzenbach* v. *Morgan*, 384 U.S. at 668, "[t]o the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to respect." Particularly in this case, where the court of appeals' conclusions regarding student immaturity were based on pure speculation, and where the district judge came to a contrary conclusion, the Congressional findings—based as they were on actual testimony—should carry considerable weight.

2. The decision below conflicts with decisions of this Court and lower courts regarding application of the First Amendment free speech clause to public secondary schools in other contexts. These decisions presuppose that high school students are capable of learning from exposure to a diversity of viewpoints, without confusing free expression with official orthodoxy. See, *e.g.*, *Board of Education* v. *Pico*, 457 U.S. 853 (1982) (plurality); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Seyfried* v. *Walton*, 668 F.2d 214, 219-220 (3d Cir. 1981) (Rosenn, J., concurring); *Russo* v. *Central School District No. 1*, 469 F.2d 623, 633 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973); *James* v. *Board of Education*, 461 F.2d 566, 574 (2d Cir.), cert. denied, 409 U.S. 1042 (1972); *Gambino* v. *Fairfax County School Board*, 429 F. Supp. 731, 736-737 (E.D. Va. 1977); *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1975) (Table).

Moreover, it is the professional educators, not Congress or the courts, who decided that the students of

Williamsport Area High School are capable of participating in the free exchange of ideas characterized by a limited public forum.[9] This decision should not be selectively abrogated by the courts merely because religion is involved.

3. If high school students, unlike college students, would construe approval of a religious club's request for permission to meet as endorsement of religion, why would they not also construe disapproval of the application as official hostility to religion—a result equally at variance with the Establishment Clause? Indeed, the district judge in this case concluded that a policy of singling out religious groups for exclusion from the school's activities period could well be viewed by the students as manifesting official hostility toward religion. Pet. App. 97a.[10]

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[9] The Equal Access Act does not limit the discretion of school officials in deciding whether to create a forum for free expressive activity; it merely provides that, if such a forum is created, the school may not "deny equal access or a fair opportunity" to students "on the basis of the religious, political, philosophical, or other content" of their speech.

[10] The School Board itself apparently recognized that its action might be construed as hostility toward Petros' religious character. The letter from the Board to the students explaining the decision included the following (Pet. App. 6a; C.A. App. A235):

> Please be assured that neither the School Board, nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.

It is not surprising that the Board apprehended that its action might be construed as hostile or discriminatory, since, as the court of appeals noted (Pet. App. 8a), Petros is the only proposed student club or activity ever denied the right to participate in the school's activities period during the memory of the principal.

The impression of state hostility to religion caused by exclusion of religious groups is not unique to this case. In its consideration of the Equal Access Act, Congress heard testimony to that effect from students, and found that many students have in fact perceived their schools' refusal to allow religious activity as manifesting discrimination and official hostility. The Senate Committee concluded that "students reasonably perceive the denial of access for religious speech as State hostility toward religion" (S. Rep. 98-357, *supra*, at 36), and stressed that "[t]he perception of State hostility is not a speculative one created by the Committee, but one held by students as evidenced by the testimony of the students themselves." *Id.* at 11, 19-20.

If it were true that high school students are too immature to appreciate the difference between neutral school actions and endorsement of (or hostility towards) religion, then school officials could not avoid violating the Establishment Clause, whether they granted or denied a request for equal access. *Any* action on a religious group's request for permission to meet would convey a state position regarding the merits of religion, according to this view. The only way out of the dilemma would be for the school to close its limited public forum—that is, to forbid any voluntary student activities on school property. Surely the Constitution does not require such a result.

B. There Is No Other Basis For Distinguishing This Court's Decision In *Widmar* v. *Vincent*

The court of appeals cited several additional grounds for not applying the teaching of *Widmar* v. *Vincent* in this setting. None of these has merit.

1. *Compulsory attendance laws.* Compulsory attendance laws may necessitate some limitations on the speech and conduct of teachers and school officials that might take advantage of the "captive audience"

of public school students. But they provide no basis for limiting the free speech of the students themselves. So long as the students may freely choose among a wide range of activities and topics, there is no compulsion. Indeed, the court of appeals itself acknowledged (Pet. App. 18a):

> [T]he activity period at Williamsport Area High School provides a forum for self-expression, by which students exercise their own discretion in deciding which organizations, if any, to support. Indeed, unlike compulsory instructional classes, which are created and designed by the school authorities, the very existence of such organizations depends entirely upon voluntary student participation and interest.

The released time program sustained by the Court in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), also took place during a period of compulsory attendance; the religious classes to which students were released took attendance and sent back to the public school a list of released students who failed to report for religious instruction. Nevertheless, the Court rejected the charge of coercion, on the ground that "the school authorities are neutral * * * and do no more than release students whose parents so request" (343 U.S. at 311).

2. *Location of the meetings.* The court of appeals also distinguished this case from *Zorach* and *Widmar* on the ground that the meetings took place on school property in a more controlled environment than a university.[11] Therefore, the court concluded, "involuntary contact between nonparticipating students and

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[11] The opinion below states that the club meetings "would be held in a classroom which, a few minutes after the meeting, is also used for regular secular classes" (Pet. App. 26a). In fact, the record shows that the club met in the school cafeteria. C.A. App. A228; Pet. App. 107a.

religious groups is inevitable. Students of differing or conflicting creeds would therefore be less able to overlook the activities of such a group within their school, and by the same token would be more likely to perceive a message of endorsement by school authorities * * *." Pet. App. 26a, 28a. However, the meetings of the religious group involved in *Widmar* also took place on university property, in classrooms and in the student center (454 U.S. at 265 n.2). The Williamsport Area High School is located on a 147-acre campus and has 2,500 students—a size comparable to many smaller college campuses. Some 25 other clubs were authorized to meet during activities period, in addition to other competing activities (homeroom, computer station, career counseling and library), as compared to some 100 clubs in *Widmar* (not necessarily all meeting at the same time). In addition, the club in this case has agreed to forego usual school bulletin boards and other organs of publicity (a restriction not undertaken in *Widmar*). In short, there is no basis for concluding that Petros was any more "visible" than the club involved in *Widmar* or similar clubs at other college campuses.[12]

3. *Presence of adult monitor.* The court of appeals concluded (Pet. App. 26a-27a) that the required presence of an adult monitor "necessarily must impart

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[12] There is no merit to the court of appeals' reliance (Pet. App. 27a-28a, 31a) on *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948). As this Court stated in *Widmar*, 454 U.S. at 271-272 n.10 (emphasis in original):

> Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. See, *e.g.*, *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

the impression to students that the school's authority and that the school's endorsement is implicated in the relevant activity, since every monitor must be approved by the school." However, the record makes clear that the only function of the monitor is to take attendance and to maintain order. The district court correctly concluded that "[i]nasmuch as the teacher would be present only to ensure orderly meetings, the instant situation would involve no more entanglement than when a state provides for 'the safety, security and general convenience' for persons attending the celebration of a Mass at the National Mall; or provides police and fire protection to a church" (Pet. App. 99a-100a (footnote and citations omitted)).

4. *Excessive entanglement.* The court of appeals concluded that the club's commitment not to use the school's newspaper, bulletin boards, or public address system—a commitment not made in *Widmar*—would entail "excessive entanglement" (Pet. App. 33a-34a). However, this purported distinction is based on a misunderstanding. The court of appeals apparently understood the students' commitment as distinguishing between "religiously oriented material" and other announcements (*id.* at 33a); this would require the school officials "to interpret the posted announcements in order to distinguish religious from non-religious content" (*id.* at 34a). However, the club's commitment was to forego *all* use of the bulletin board, public address system or newspaper to publicize their meetings—a commitment which, as Judge Adams pointed out (*id.* at 59a), "represents a simple, easily-administered rule" that does not require the school authorities to distinguish religious from non-religious content.

Indeed, as Judge Adams observed, enforcing a ban against religious meetings could prove to be far more "entangling" (Pet. App. 59a). Cf. *Walz* v. *Tax Com-*

mission, 397 U.S. 664, 674-675 (1970) (granting tax exemptions to churches gives rise to lesser government involvement than would taxing them). For example, assume that the students involved in Petros, or other students of a known religious orientation, were to form a Philosophy and Ethics Club. How could the school be sure that this club was not a "cover" for religious meetings? Presumably the adult monitor would have to keep a close and continuous watch over what the students said and did at each meeting to "determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove to be an 'impossible task in an age where many and various beliefs meet the constitutional definition of religion.' " *Widmar*, 454 U.S. at 272 n.11. In essence, the school would have to assume a continuing role of religious censorship over such a club's meeting—a role totally offensive to the values of the First Amendment.

C. Allowing Petros Meetings Would Be Consistent With The Fundamental Principles Of The First Amendment

The Establishment Clause, no less than the Free Exercise Clause, was intended to advance the cause of individual choice and religious liberty. The focus of the Establishment Clause is on prohibiting government establishment of a religious orthodoxy; on promoting "diversity and pluralism in all areas." *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 8. The drafters of the Bill of Rights had no intention to place religionists or religious speech under any special disabilities, even within the public arena. See *McDaniel* v. *Paty*, 435 U.S. 618, 637, 641 (1978) (Brennan, J., concurring).

Indeed, it is no exaggeration to state that the result below is *directly contrary* to the original in-

tent, and that it interprets the Establishment Clause in a manner expressly feared and sought to be avoided by its drafters. The principal point of criticism of the early drafts of the Establishment Clause by members of the First Congress was that it might be interpreted in a way that would be "extremely hurtful to the cause of religion." 1 *Debates and Proceedings in the Congress of the United States* 758 (Aug. 15, 1789) (J. Gales ed. 1834) (remarks of Rep. Huntington); see also *id.* at 757 (remarks of Rep. Sylvester). The response of James Madison, principal author of the draft Amendment, was that "the object it was intended to prevent" was that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform" (*id.* at 758-759; see also *id.* at 758). A policy of equal access for all groups is precisely the ideal envisioned by the Founders. An exclusion of religious groups from a forum otherwise open to all offends the very core of the First Amendment. *Widmar* v. *Vincent*, *supra*; *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); see generally M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 6-17 (1978).

This case does not require the Court to explore the limits of affirmative accommodation of religion; the student petitioners ask only that they be treated in the same way as any other student group. See *Widmar* v. *Vincent*, 254 U.S. at 273 n.13. They seek tolerance, equal treatment, nondiscrimination. This case thus touches on the values of the First Amendment at a particularly profound and sensitive level. The question whether, in this setting, the Establishment Clause authorizes the singling out of religious speech for direct discriminatory prohibition is one that this Court should promptly decide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

The Catholic League for Religious and Civil Rights respectfully moves this Court, pursuant to Rule 36.3 of its rules, for leave to file the accompanying brief *amicus curiae* in support of petition No. 84-723. The consent of the parties has been sought. While written consent has been received from one of the two parties, written consent has not been received from the other party, the respondents.

Amicus believes that the decision and reasoning of the court of appeals follows a precedent of hostility and discrimination toward religiously oriented speech. This decision impairs the religious freedom of high school students and, ultimately, of all citizens. *Amicus* believes that these religious freedom concerns may not be fully presented to the Court unless the brief *amicus curiae* is considered.

Therefore, *amicus* requests this Court to grant this motion and consider the accompanying brief in support of the petition for certiorari.

Respectfully submitted,

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Respondents.

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights is a non-profit voluntary association, national in membership, organized to promote good will and harmonious relations in the community, to combat all forms of religious prejudice and discrimination and to defend the human rights and sanctity of each human life.

The Catholic League possesses a firm commitment to the preservation of all the principles embodied in the First Amendment to the U.S. Constitution. As a result of the dangers which the Catholic League believes an adverse judgment in this case would pose to these fundamental rights, the League has sought to file this brief of amicus curiae on behalf of the petitioners in this action.

STATEMENT OF THE CASE AND ISSUES PRESENTED

Amicus curiae, the Catholic League for Religious and Civil Rights, adopts and incorporates by reference both the statement

of the case and of issues presented which appear in the brief of Plaintiffs-Petitioners.

SUMMARY OF ARGUMENT

Many of the difficulties in the decision of the Court of Appeals in this matter stem from its reliance upon confusing legal precedent and, most particularly, the Second Circuit's ruling in *Brandon v. Board of Education of Guilderland Central Schools*, 635 F.2d 971 (2nd Cir. 1980), *cert. denied*, 454 U.S. 1154 (1981). The *Brandon* ruling is irretrievably flawed in two significant respects. First, the *Brandon* court misinterpreted the scope and extent of the free speech rights of high school students by failing to find the existence of a limited public forum. Second, the court misinterpreted the distinction between accommodation and advancement of religion in ruling that permitting a group of high school students to voluntarily gather prior to the school day's commencement to offer a prayer violated the Establishment Clause of the First Amendment. Given the confusion *Brandon* has subsequently imposed on the field of equal access, particularly evidenced by the case currently before this Court, the reasoning underlying the *Brandon* decision should be repudiated and the ruling of the Court of Appeals should be reversed, following a grant of the petition for certiorari.

INTRODUCTION

The United States Court of Appeals for the Third Circuit, in issuing its recent ruling in *Bender v. Williamsport*, 741 F.2d 538 (3rd Cir. 1984), emphasized, "We are therefore left with no definitive guidance from the Court as to the proper direction to take in this unique circumstance." *Id.* at 557. The court accurately assessed the desperate need of the lower courts in this area for guidance from this Court. The need for guidance however, concerns not the proper balancing of the Free Speech and Establishment Clause interests of which the Third Circuit spoke, but concerns rather the proper method of analyzing alleged Establishment Clause violations in equal access cases.

The numerous conflicting rulings in these areas illustrate the vital need for such a determination. *Compare, Nartowicz v.*

Clayton County School District, 736 F.2d 646 (11th Cir. 1984), *with Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038, *reh'g denied*, 680 F.2d 424 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983); *Johnson v. Huntington Beach Union High School District*, 137 Cal. Rptr. 43, 68 Cal. App. 3d 1, *cert. denied*, 437 U.S. 887 (1977). Much of the confusion which presently pervades this area was initiated by a ruling of the United States Court of Appeals for the Second Circuit, *Brandon v. Board of Education of Guilderland Central Schools*, 635 F.2d 971 (2nd Cir. 1980), *cert. denied*, 454 U.S. 1154 (1981). Indeed, the *Brandon* ruling has extensively affected most of the subsequent cases in this area. Though not controlling precedent outside of its circuit, its impact in this area has been substantial. In fact, it was often cited by the Third Circuit in *Bender* as support for that court's ultimate Establishment Clause ruling. Given the constitutional infirmities present in the *Brandon* ruling, amicus curiae respectfully requests that the Court now overrule it.

ARGUMENT

THE SECOND CIRCUIT'S RULING IN *BRANDON* DIRECTLY CONFLICTS WITH THIS COURT'S INTERPRETATION OF THE FREE SPEECH AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In *Brandon*, a group of high school students, organized as "Students for Voluntary Prayer," requested permission to meet in a classroom for a group prayer immediately before the school day commenced. The group noted that it was only seeking the same access to school facilities which other student groups already enjoyed, and that its activities were voluntary and would not conflict with other school functions. When their request was denied by both their principal and school district the students brought suit for declaratory, injunctive and monetary relief. They alleged that such a denial violated their First Amendment Rights.

The District Court granted the school district's motion for summary judgment. On appeal, the Second Circuit affirmed that

decision, holding that the refusal did not violate the students' rights to free speech, freedom to exercise their religion, freedom of association, or equal protection. In addition the court concluded that such prayer meetings were prohibited by the Establishment Clause.

A. *Brandon* Misinterprets The Free Speech Rights Of High School Students.

Brandon's ruling on the Establishment Clause issue there presented has had a far greater impact on subsequent courts than its Free Speech determination. In fact, this Court's ruling in *Widmar v. Vincent*, 454 U.S. 263 (1981), only a week prior to the Court's denial of the students' request for a writ of certiorari in *Brandon*, 454 U.S. 1123 (1981), served implicitly to reverse the *Brandon* court's determination on the Free Speech issue. However, some attention should be paid to the clearly erroneous conclusion which the court in *Brandon* arrived at regarding this fundamental right.

In *Widmar*, the Court upheld a request by a student group at the University of Missouri-Kansas City, which sought access to university-owned facilities in order to meet for prayer, Bible study and worship. This Court held that the university's content-based restriction on the use of their facilities violated the students' right to free speech and was not warranted by a compelling state interest. As a result of *Widmar's* ruling, significant errors in the Second Circuit's constitutional interpretation in *Brandon* become immediately recognizable.

It is true that local school boards are afforded broad discretion in the management of their schools' affairs. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). However, while "Boards of Education . . . have . . . important, delicate, and highly discretionary functions . . . they may not [exceed] . . . the limits of the Bill of Rights." *Board of Education, Island Trees Union Free School District v. Pico*, 102 S. Ct. 2799, 2807 (1982). Therefore, as the Court emphasized in *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), students do not "shed their rights to freedom of speech or expression at the school house gate. . . . They are possessed of fundamental rights which the state must respect . . . [and] . . . in the absence

of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 506, 511. Despite this knowledge, the court in *Brandon* incorrectly interpreted the extent of students' First Amendment right to free speech in at least two ways.

First, when the court in *Brandon* analyzed the students' free speech claim, it erroneously stated that religious speech, including prayer, was not to be accorded the same constitutional protection as other types of speech. *Brandon,* 635 F.2d at 980. Yet, such a distinction was specifically rejected in *Widmar.* The Court responded to any attempt to relegate religious speech to such a secondary status by noting that such a contention lacked any "*intelligible content.*" *Widmar,* 454 U.S. at 269 n.6 (emphasis added).

Second, and further developing this view of religious speech as possessing diminished constitutional value, the *Brandon* court concluded that a high school was not a public forum where religious views could be aired. It is true that a high school does not meet the traditional test for public forums. "The primary factor in determining whether property . . . is a public forum is how the locale is used." *International Society for Krishna Consciousness v. New Jersey Sports and Exposition Authority,* 691 F.2d 155, 160 (3rd Cir. 1982). Thus, places traditionally or normally reserved for public assembly, debate, etc. . . . are considered public forums. *See, e.g., Hague v. C.I.O.,* 307 U.S. 496 (1939). Since high schools are not normally dedicated to such activities, they would not satisfy the traditional test for a public forum.

However, public property can be classified as a "limited" public forum. A limited public forum arises as the result of the state's decision to allow the property to be used for expressive activity. A prime example of such a limited public forum arose in *Widmar.* There, the Court stated that "through its policy of accommodating . . . meetings, the University . . . created a forum generally open for use by student groups." *Widmar,* 454 U.S. at 267. The Court acknowledged that the government would be permitted to impose restrictions on the use of the limited public forum so long as they were necessitated by the purpose for which the forum was created. *Id.* at 267. Thus, with respect to limited public forums created in a school setting, the government could

permissibly restrict access to the forum from individuals "outside" the school.

Yet, the Court emphatically warned that:

> [I]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must . . . satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Id. at 269-70. *See also Carey v. Brown*, 447 U.S. 455, 461, 464-65 (1980).

The Court noted that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Id.* at 267-68.

Through making its facilities open to use by all student groups, it is beyond dispute that the school in *Brandon* created a similar, "limited" public forum. To read *Widmar* so narrowly as to say that only universities, and not high schools, possess the capability to become limited public forums, completely misconceives this doctrine. On the contrary, this Court noted in *Tinker* that a public high school "is peculiarly the 'marketplace of ideas,' " *Tinker*, 393 U.S. at 512, though it recognized that the high school setting possessed "special characteristics" which had to be taken into account. *Id.* at 506. Thus, given the proper circumstances, a high school could take on a limited public forum status.

In its ruling in *Bender v. Williamsport*, 563 F. Supp. 697 (M.D. Pa. 1983), the district court enumerated "special circumstances" whereby a high school would not qualify as a limited public forum. However, none of these were evident in *Brandon*. The school district at no time claimed that a voluntary prayer meeting prior to the school day's commencement would result in order or discipline problems. Nor was it ever the school district or principal's contention that there were an excessive number of requests from other student groups for such meetings. And the record is likewise devoid of any claim that such groups only met as an extension of the school's curriculum. Consequently, since none of these special circumstances existed, and since other

groups covering a wide range of interests were permitted to meet prior to the school day, it is clear that the school had created a limited public forum for its students' use. Accordingly, any content-based restriction on that forum's use constitutionally had to be narrowly drawn and necessary to serve a compelling state interest. *Widmar*, 454 U.S. at 270.

B. Precluding Students From Voluntarily Gathering In School-Owned Facilities Prior To The School Day's Commencement To Engage In Group Prayer Traverses The Historical Goals Of Neutrality And Accommodation Rooted Within The Establishment Clause.

The Third Circuit's ruling in *Bender* encountered many of the same problems of previous lower court decisions resolving the Establishment Clause issue in light of the Second Circuit's ruling in *Brandon*. The court in *Bender* did arrive at the issue in a different manner than the *Brandon* court. *Bender* properly avoided the clearly flawed analysis of the *Brandon* decision in the Free Speech realm and concluded that the denial of the student group's (Petros) request would infringe upon their constitutional right of Free Speech and could only be justified by the existence of a compelling state interest, *Bender*, 741 F.2d at 550, such as the avoidance of an Establishment Clause violation. The *Brandon* court, on the other hand, only addressed the Establishment Clause issue as a result of a potential Free Exercise contention (which the court subsequently rejected). However, though reaching the issue through different approaches, both of these judicial bodies used similar reasoning to arrive at the identical conclusion—that permitting these school groups to meet would be violative of the Establishment Clause and that such a violation outweighed the students' Free Exercise (*Brandon*) or Free Speech (*Bender*) rights. However, both of these rulings are in complete discord with the historical purpose behind the Establishment Clause.

1. The *Brandon* court properly concludes that the school's policy of permitting students to gather in school owned facilities possesses a secular purpose.

A tripartite test exists for Establishment Clause adjudication, whether it be merely a guideline, *Lynch v. Donnelly*, 104 S. Ct.

1355, 1361-1362 (1984) or necessary measure of constitutionality, *Lynch*, 104 S. Ct. at 1372 n.2 (Brennan, J., dissenting): "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). If any one of the prongs of the *Lemon* test is not met, then the policy may be held to violate the Establishment Clause. *See, e.g., Lemon*, 403 U.S. at 612; *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

The *Brandon* court did correctly apply the first prong of the Establishment Clause. The judge noted that this prong's focus was on whether the policy which permitted the activity to take place had a secular purpose. *Brandon*, 635 F.2d at 978. It was axiomatic that an equal access policy for all student groups was rooted in a secular purpose. The mere fact that a religious group wished to take advantage of this policy did not convert the policy's purpose into an impermissible nonsecular one. *Brandon*, 635 F.2d at 978. *See also Widmar*, 454 U.S. at 271-72 n.10.

2. *Brandon's* determination that a content-neutral equal access policy has the primary effect of advancing religion reflects an inaccurate and inconsistent view of the judicial treatment of high school students.

The *Brandon* court stated that because an impressionable student might believe the state was sponsoring a particular religious creed, such an equal access policy was "too dangerous to permit." *Brandon*, 635 F.2d at 978. In reaching this conclusion, the *Brandon* court is in complete disharmony with the reasoning of this Court in *Widmar*. *Widmar* stated that the effect of according religious groups equal access to the limited public forum would not be an advancement of religion, but rather merely an accommodation of religion. *Widmar*, 454 U.S. at 273. Two factors enabled this Court to reach this conclusion:

> First, an open forum . . . does not confer any imprimatur of State approval on religious sects or practices[;] . . . such a policy "would no more commit the University . . . to religious goals" than it is "now committed to the goals of [other groups]" eligible to use its facilities.

> Second, the forum is available to a broad class of nonreligious as well as religious speakers; . . . [t]he provision of benefits to so broad a spectrum is an important index of secular effect.

Id. at 274 (citations omitted).

Both of these factors were present in *Brandon*. The limited public forum was available to a broad range of nonreligious school organizations. (While the number of such groups was significantly less than the 100 groups which existed in *Widmar*, when one takes into account the enrollment difference between the two schools, the two become proportionally similar.) In addition, allowing a student group to gather on state-owned facilities confers no more imprimatur of state approval of religion than it would confer approval of that which was printed in the school's student newspaper, were the newspaper staff to meet in the same facilities.

There is a clear distinction between advancement and accommodation; a distinction which escaped the judges in *Brandon*. Regrettably, lacking the guidance of *Widmar*, the court in *Brandon* mistakenly relied on the precedents of *Abington Township School District v. Schempp*, 374 U.S. 203 (1963) and *Engel v. Vitale*, 370 U.S. 421 (1962). Yet, the obvious factual differences which existed between these cases and the scenario present in *Brandon* graphically displayed the inappropriateness of their use. Failing to grasp these distinctions, the *Brandon* court came to the inaccurate conclusion that advancement results not only from compulsory action, *Schempp; Engel* (objecting students had no choice but to refrain conspicuously from participating in official religious activity) but also from purely voluntary action undertaken completely apart from the other students, *Brandon*. Such a broad rule was certainly not intended by this Court when it proscribed conduct which had the "primary" effect of "advancing" religion.

Moreover, the *Brandon* court's incomprehensible assessment of the maturity level and intellectual capacity of these high school students further evidences the court's inability to recognize the distinction which exists between advancement and accommodation. While *Widmar's* statement, that college-aged students were

in a position to appreciate that an equal access policy did not imply state approval of the participating groups' activities, does not literally encompass the high school setting, at no time did this Court determine that the relevant maturity and intellect was restricted to college students. Indeed, such a restriction defies common knowledge and common sense.

Undeniably, high school student are not yet adults. Yet, this fact alone does not necessitate a determination that they are helpless individuals, dependent totally upon others to decide for them the important questions which face our society; nor have courts viewed high school students in such a light. The author of *Brandon*, Judge Kaufman, himself admitted this fact. In deciding that tenth grade students possessed sufficient maturity that a teacher's refusal to lead a flag salute would not have a destructive effect on the students, Judge Kaufman stated:

> We do well to note that her pupils were not fresh out of their cradles . . . [They were] students ranging in ages between 14 and 16 years . . . [who] at this stage of development are approaching an age when they form their own judgments. They readily perceive the existence of conflicts in the world around them[;] . . . [n]or is this knowledge to be dreaded. As we said in *James*: "Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue."

Russo v. Central School District No. 1, 469 F.2d 623, 633 (2nd Cir. 1972).

Other jurisdictions have also described these same students as "surprisingly sophsticated, intelligent, and discerning . . . far from easy prey for even the most forcefully expressed, cogent, and persuasive words." *Wilson v. Chancellor*, 418 F. Supp. 1358, 1368 (D. Or. 1976). And in *James v. Board of Education*, 461 F.2d 566 (2nd Cir. 1971), it was emphasized that "the court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the latter grades of secondary schools[;] . . . [h]igh school students . . . are at an age approaching both adulthood and franchise." *James*, 461 F.2d at 574. Moreover, there is empirical evidence that supports the judicial notice of the high school students' intellectual maturity.

See Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-509 (1983).

It is precisely because of this recognized level of maturity present in today's high school student that a federal district court decided that high school students could handle reading information about contraception and abortion in their school newspaper. *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd without opinion*, 515 F.2d 504 (2nd Cir. 1975). In fact, this very Court has even concluded that these same individuals are entitled not only to information concerning such topics as abortion and contraception but also to utilize such methods absent their parents' *consent* or *knowledge*. *Accord Bellotti v. Baird*, 443 U.S. 622 (1979); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Danforth v. Planned Parenthood of Cent. Missouri*, 428 U.S. 52 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Further, they are viewed with sufficient intellectual capacity to be permitted to bear armbands in protest against the Vietnam War, *see Tinker*, and to refuse to salute or pledge allegiance to the flag, *see West Virginia Board of Educ. v. Barnette*, 319 U.S. 624 (1943). It is inherently inconsistent to hold that high school students are mature enough to handle the political, social and moral issues facing society today, but lack sufficient insight to distinguish a government-run event from a pure student-initiated activity.

Moreover, if high school students possess such a high degree of impressionability, then logic would dictate that these same individuals will interpret the school's content-based restriction in an otherwise open forum as a manifestation of government hostility toward religion. How is it that these "impressionable" students are unable to determine whether the state is implying, tacitly or otherwise, an approval of religion, but they are *mature* enough to realize that the state's policy is not rooted in a hostility towards religion? The Establishment Clause prohibits both government endorsement and disapproval of religion. *Lynch*, 104 S. Ct. at 1368 (O'Connor, J., concurring); *Committee for Public Educ. v. Regan*, 444 U.S. 646, 653 (1980); *Lemon*, 403 U.S. at 612. The State must be neutral in this area. *Nyquist*, 413 U.S. at 782. As was properly pointed out by the dissent in *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 680 F.2d 424

(5th Cir. 1982): "We should not forget, however, that the young student may also be given the impression that our government and the court and the schools are *hostile* to all religious beliefs and practice. I would consider that a very great wrong to the children, to the Constitution, and the nation." *Id.* at 426 (Reavley, J., dissenting) (emphasis added). *See also Bender*, 741 F.2d at 565 (Adams, J., dissenting). Indeed such a hostile impression may already have been implanted in the minds of some of our youth. *See Hearings on S. 425, S. 815, & S. 1059 Before the Senate Committee on the Judiciary*, 98th Cong. 1st Sess. (1983) (statement of Bonnie Bailey, student of Monterey High School, Lubbock, Texas) ("The impression of many students is that the school administration or the school board or the courts, or all of them, are hostile toward religion[,] . . . [and that the government] is against religion") Further, the court in *Brandon* was strangely silent on this point.

3. The *Brandon* court's finding of an excessive entanglement between religion and government is completely incompatible with prior and subsequent Supreme Court precedent.

Brandon's ruling that permitting a religious student group to meet would foster an excessive entanglement between religion and the State also lacks any precedential support. The court concluded that since school officials would be required to supervise the meetings in order to ensure that they were voluntary and orderly, this would yield an excessive entanglement and was impermissible. *Brandon*, 635 F.2d at 979.

Such minimal supervision, however, would involve no more of an "entanglement" than that which occurs when the State provides police or fire protection to a church. Yet this very Court has determined that such protections do not violate the Establishment Clause. *See Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 747 (1976); *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 17 (1947). Nor have courts felt that providing policemen for a religious rally held in a public park or the celebration of a Mass at a mall result in an excessive entanglement. *See O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979).

Moreover, in *Widmar* this Court stated that it would be more of an entanglement to require school officials to monitor the content of each group's meetings (in order to enforce the exclusion of religious speech) than it would be to passively permit such speech. The Court stated:

> [T]he University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." . . . Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "*an impossible task in an age where many and various beliefs meet the constitutional definition of religion.*" . . . There would also be a continuing need to monitor group meetings to ensure complaince with the rule.

Widmar, 454 U.S. at 271 n.11 (citations omitted) (emphasis added).

Thus, it is clear that *Brandon's* remarks in this area are completely incompatible with prior and subsequent courts' decisions regarding excessive entanglement.

This review of the three prongs of the tripartite Establishment Clause test set forth by this Court demonstrates the absence of any violation in the *Brandon* fact pattern. It follows that such an alleged violation did not provide the necessary compelling state interest required to justify the content-based restriction on the *Brandon* students' rights to free speech. Since the students' free speech rights were restricted, and since the school district offered no other constitutionally acceptable justification for this restriction of rights, the *Brandon* conclusion is irretrievably flawed, directly contradicts the First Amendment to the U.S. Constitution, and requires reversal.

CONCLUSION

When inconsistency and misinterpretation pervade a fundamental area of constitutional law, this Court fulfills its function most nobly by resolving the controversy. The particular area presently before this Court has been fraught with confusion since the Second Circuit issued its ruling in *Brandon v. Board of Edu-*

cation of Guilderland. Moreover, this confusion has recently been compounded with Congress' passage of The Equal Access Act 98 Stat. 98-1302 (1984). Despite the clear constitutionality of that Act, many believe it to be unconstitutional and refuse to adhere to its teachings. *See* Appendix To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit In The Case Of *Bender v. Williamsport,* Appendix D, letter of October 10, 1984 from Nathan Stuart, Esq. to Gerald Seevers, Esq., p. 111a. It is essential that this Court resolve the present controversy and provide the lower courts with the guidance they so vitally need to interpret our Constitution properly. Such guidance of necessity entails the reversal of the Second Circuit's holding in *Brandon* and the Third Circuit's holding, so indebted to the flawed ruling of *Brandon,* in *Bender.* It is only through such rulings that the importance that all speech, including religious speech, carries in our republican society will be clearly established for all to see and respect.

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No. 84-773

In the Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, ET AL., PETITIONERS

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a public high school violates the Establishment Clause if it permits a voluntary student religious club to meet on school property during a student activities period in which all other voluntary student groups are permitted to meet.

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INTEREST OF THE UNITED STATES

The question in this case is whether the First Amendment requires a public high school to exclude a voluntary student religious club from meeting on school property during a student activities period in which all other voluntary student groups are permitted to meet. The interest of the United States arises from the fact that Congress has recently addressed the issue.

After extensive hearings and debate, the Equal Access Act (Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.*) (set forth in full at Pet. App. 113a-115a) was passed by the House of Representatives (by a 337-77 vote) and the Senate (by an 88-11 vote), and signed by the President on August 11, 1984. The Act makes it unlawful for any public secondary school receiving federal aid and having a "limited open forum" to deny access to students who wish to conduct a meeting, on the basis of "the religious, political, philosophical, or other content of the speech at such meetings." "Limited open forum" is defined as granting access for noncurriculum-related student

groups to meet on school premises "during noninstructional time," which is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." The school "is deemed to offer a fair opportunity to students" if it provides, on a uniform basis, that meetings be "voluntary and student-initiated"; that there be "no sponsorship of the meeting by the school"; that "employees or agents of the school or government [may be] present at religious meetings only in a nonparticipatory capacity"; and that "non-school persons may not direct, conduct, control, or regularly attend" such meetings. §§ 802, 803, 98 Stat. 1302, 1303.

The court of appeals held, by a divided vote, that a public high school would violate the Establishment Clause by allowing a voluntary religious club to meet on school premises during a student activities period. If allowed to stand, the decision of the court of appeals would cast doubt on the constitutionality of the Equal Access Act, and would frustrate the congressional objective of resolving the constitutional issue with a minimum of additional, costly litigation. See S. Rep. 98-357, 98th Cong., 2d Sess. 12, 21 (1984).[1]

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[1] One State Attorney General, in reliance on the decision below, has formally opined that the Equal Access Act is unconstitutional, and has, in effect, instructed State educational officials not to comply with it. 69 Op. Md. Att'y Gen. No. 84-031 (Dec. 6, 1984). The American Association of School Administrators has distributed guidelines for implementing the Equal Access Act, which are prefaced by the advice that states covered by the Third Circuit (among others) "could be out of compliance with previous circuit court rulings if they act to implement the law." American Association of School Administrators, *Equal Access: Interpretation and Implementation Guidelines* 1 (1984). These examples demonstrate that the decision below is having a direct effect on implementation of the Act.

The court below relied principally on its perception that high school students are not sufficiently mature to understand that granting religious groups equal access would not constitute school endorsement of religion—a view expressly investigated, and rejected, by Congress in its factfinding capacity (*id.* at 9-10, 34-35). Other factors relied on by the court below are also likely to be present in cases covered by the Equal Access Act, including the use of school premises for meetings and the presence of adult monitors.[2] If the court of appeals' reasoning is accepted, most situations covered by the Equal Access Act might also be viewed as constituting an official endorsement of religion.

STATEMENT

1. Williamsport Area High School is located on a 147-acre campus, more than a mile from the nearest residence (C.A. App. A239, A248-A249). Most students are bused to the school (*id.* at A246). The school day starts at 7:45 a.m., with a 12-minute homeroom period, during which attendance is taken and announcements made (*id.* at A365).

On Tuesdays and Thursdays, the opening homeroom period is followed by a 30-minute period for

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[2] The court of appeals also relied in part on the fact that the activities period at the Williamsport Area High School took place during hours of compulsory school attendance for most of the students (*i.e.*, those seventeen or younger). Pet. App. 8a, 25a, 30a-31a, 42a. The Equal Access Act applies only where the student activities occur "before actual classroom instruction begins or after actual classroom instruction ends" (§ 803(4), 98 Stat. 1303). However, as this case illustrates, where the activities period occurs at the beginning of the day (or after a brief opening homeroom during which no instruction occurs), the language of the Act would appear to apply despite the fact that the activities period is covered by compulsory attendance laws. Thus in this respect as well, the decision below may conflict with applications of the Equal Access Act.

extracurricular student activities (Pet. App. 69a n.5). During this period, students may attend student club meetings, study in the library, visit the computer station, examine career or college placement materials, or stay in their homerooms (*id.* at 7a-8a). The student clubs that meet during this activities period are entirely voluntary (*id.* at 8a). There is no written policy concerning what type of club may be allowed to meet. However, the principal stated that he would permit any lawful club that would "contribute to the intellectual, physical or social development of students" (*id.* at 9a; C.A. App. A367). This principal has served since 1974; in his memory, no student club had ever been denied permission to meet, until this case (Pet. App. 8a).

This case arose out of a request by students at the school to form a club for the purpose of meeting to read and discuss the Bible and to pray. The club (called "Petros") agreed not to publicize its meetings through the school's public address system, bulletin board, or newspaper. Pet. App. 33a. The club was initially allowed to meet during the activities period. The first meeting was attended by 45 students (out of a student body of 2,500). *Id.* at 4a-6a, 68a-71a. In accordance with school policy, a teacher was present during the meeting, took attendance, and thereafter sat in the room grading papers (*id.* at 9a-10a, 69a-70a). After the first meeting, the school superintendent obtained an opinion of counsel to the effect that allowing the club to meet on school property would violate the Establishment Clause. On this basis, the superintendent denied the club further permission to meet during the activities period. The students were offered the alternative of released time during which they could conduct their meetings away from school property. *Id.* at 71a-72a. While the record does not show why they declined this alterna-

tive, it was obviously impractical in view of the location of the school (over a mile from the nearest residence) and the brief duration of the activities period (30 minutes).

The superintendent's decision was affirmed by respondent School Board (Pet. App. 72a). The Board's action was based solely on advice of counsel that "[p]resent law simply does not permit public schools to authorize or support religious activities on school property" (*id.* at 6a; C.A. App. A235). The Board has never suggested any programmatic or educational reason for excluding the group.

2. The students then brought this action for declaratory and injunctive relief against the School Board and its members, in both their individual and official capacities. Relying on *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the district court held that the high school had created a "limited public forum" by establishing an activities period open to any legitimate student activity, and rejected the Board's argument that allowing Petros to meet would violate the Establishment Clause. Since this was the only rationale for the exclusion, the district court concluded that under the First Amendment this "content-based decision to exclude subject matter" could not stand. Pet. App. 81a-82a.[3]

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[3] The district court acknowledged that if the activities period were part of the school's curriculum, the superintendent would have had wide discretion to limit subject matter as part of his power to define the curriculum. However, the court pointed out that the sole reason offered for excluding Petros was legal advice regarding the Establishment Clause; the superintendent never purported to be exercising his authority to define the curriculum. Pet. App. 82a-85a.

After the district court decision, respondent School Board decided to comply with the decision and not to appeal. Respondent John C. Youngman, Jr., a member of the Board and parent of children in the school system, appealed. A divided panel of the court of appeals reversed. While agreeing that the school had created a limited public forum in its activities period, and thus that the students had a "valid first amendment interest to engage in their proposed activity" (Pet. App. 20a-21a), the court "balanc[ed] the respective constitutional interests [free speech and nonestablishment] which would be lost and gained if Petros were granted access to the activity period" (*id.* at 42a), and concluded that "there is a greater vindication of the protections of the Constitution if the Establishment Clause prevailed in this instance" (*id.* at 43a).

As a result of the court of appeals' decision, the School Board has reverted to its former policy of denying the students the right to participate in the activities period (Pet. App. 109a-110a).[4]

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[4] There unquestionably remains a case or controversy, since the student petitioners continue to desire to meet, and the School Board continues to refuse permission. That the School Board is a nonlitigating respondent (in effect, a disinterested "stakeholder") does not affect this, since the Board (by complying with the court of appeals' judgment and by resisting attorneys' fees) has in effect treated the appeal by respondent Youngman as its own. See Pet. 8-9 n.7. Nor has the end of respondent Youngman's tenure as a Board member rendered the case moot in a technical sense as to him. The only way for him to challenge petitioners' entitlement to attorneys' fees under 42 U.S.C. 1988 was for him to appeal the underlying judgment.

These matters were brought to the attention of the court of appeals (see Pet. for Reh'g 5 n.2), which implicitly held that the case remained justiciable.

REASONS FOR GRANTING THE PETITION

I. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING A MAJOR AND RECURRING CONSTITUTIONAL ISSUE

This case raises one of the most significant and hotly-contested issues in the area of free speech and religion: whether high school students wishing to meet for purposes of voluntary, student-initiated, and student-directed religious speech must be excluded from forums within the high school otherwise available to all.

As this case illustrates, the conflict is generally not between the students and the high school authorities, but between students and a view of the law—a view that equal treatment of religious speech in the high school setting would somehow violate the Establishment Clause of the First Amendment. Here, as elsewhere, high school authorities have determined that the students would benefit from the opportunity to meet together for student-initiated, student-directed activities of their choice. C.A. App. A244, A276. The principal and school board have not sought the role of censor; they are willing to allow the students to choose their own topics of interest, including religious matters. But here, as elsewhere, the school authorities have been advised by their attorneys that they must—as a matter of constitutional law—restrict their students' activities to the non-religious. Pet. App. 66a. The result is to diminish both the liberty of the students and the discretion of the school authorities.

Conflicts such as this are increasingly frequent and should be resolved. In its recent investigation into the issue, Congress found that "many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity." S. Rep. 98-357, 98th Cong., 2d

Sess. 6 (1984); accord, H.R. Rep. 98-710, 98th Cong., 2d Sess. 3 (1984). The reason, Congress found, is not "malevolence toward religion" but the administrators' "erroneous[] belie[f] that the Establishment Clause prohibits students from engaging in such speech at all, even when other types of extracurricular student speech are permitted." S. Rep. 98-357, *supra*, at 6; accord, H.R. Rep. 98-710, *supra*, at 3, 4. The principal reason for passage of the Equal Access Act (Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.* (Pet. App. 113a-115a)) was to "clarify and confirm" the First Amendment rights of students in this context, and thereby "resolve the dilemma" faced by school administrators in reconciling the assertedly conflicting demands of free speech and nonestablishment. S. Rep. 98-357, *supra*, at 3, 21.

As the district court below stated (Pet. App. 101a), guidance from this Court is needed to resolve the issue. We believe this case is an appropriate vehicle for the Court to consider the question, for two reasons.

First, the record and the extensive factual findings of the district court present the legal issue sharply and clearly, and the thorough opinions below have fully fleshed out the relevant areas of legal dispute. Moreover, this case presents the paradigm of the "equal access" issue, without any extraneous or unusual factors (such as school administration involvement in supporting religious activities) that would cloud the issue. Cf. *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 1983).[5]

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[5] The history of prior school promotion of religious activities in *Lubbock* distinguishes that case, in which this Court denied a petition for a writ of certiorari.

Second, the congressional objective of prompt resolution of this issue is frustrated by continued uncertainty. Further exploration of the issues by the lower federal courts is not necessary; on the contrary, both student groups and school administrators would profit by a definitive answer. As the Senate Report noted, continued uncertainty is resulting in a general practice of restraint of constitutionally protected speech (S. Rep. 98-357, *supra*, at 14-15), as well as substantial expenditures of taxpayers' money on litigation (*id.* at 21).

This case did not arise under the Equal Access Act, which was passed by the Senate one day after the court of appeals rendered the judgment below. It does not, therefore, raise any issue regarding the scope or meaning of the Act. However, the Establishment Clause issues raised by this case are identical to those that will be raised by applications of the Act under similar circumstances. There is no reason for the Court to await a case filed pursuant to the Act to resolve these issues.

II. THE JUDGMENT OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISIONS PERMITTING RELIGIOUS SPEECH ON THE SAME BASIS AS OTHER SPEECH

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court held that the University of Missouri at Kansas City had created a limited public forum by making its facilities available for a broad spectrum of student groups, and that having done so, it could not close its facilities to a group wishing to engage in religious worship and discussion. The Court specifically held that permitting religiously oriented groups, among a broad spectrum of other groups, to use University facilities would not violate the Establishment Clause, because a neutral policy of equal access does not convey "any imprimatur of state approval" of religious activities (454 U.S. at 274).

However, in a footnote the Court noted that university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion" (454 U.S. at 274 n.14). Seizing on this remark, the court of appeals sought to distinguish *Widmar* on the ground that more impressionable high school students might view the school's action in allowing a religious group to meet as an official endorsement of religion, rather than as official neutrality.

We submit that neither the "impressionability" factor nor any of the other grounds proposed by the court of appeals for distinguishing *Widmar* can withstand analysis.[6] When a limited open forum has been created, whether in a public high school or in a university, the Constitution does not demand that religious groups be singled out for exclusion from it.

A. The Presumed Greater Impressionability Of High School Students Is Not A Basis For Permitting Discrimination Against Religious Groups

Judge Adams, in his dissent below, correctly stated that "there is no clear constitutional distinction based on the comparative intellectual capacities of 14-18 year olds as opposed to 18-22 year olds" (Pet. App. 48a-49a). The court of appeals has "forge[d] a constitutional principle, with all the rigidity which it invariably creates, from vague impressions of the emotional sophistication of high school students" (*id.* at 49a). The majority's "impressions" differ from the district judge's conclusion in this case (*id.* at 93a-

[6] Indeed, in one important respect, the instant case is less troublesome than *Widmar*. Here, unlike in *Widmar*, the school authorities are willing to permit the students to meet for religious purposes, provided they can do so legally. The concerns of the dissenting opinion in *Widmar* regarding compelling the University against its will to allow the students to meet are therefore absent here.

94a), as well as from congressional findings made in connection with the recent passage of the Equal Access Act. Moreover, they are inconsistent with the view adopted by this and other courts in decisions holding that First Amendment protections of free speech apply to students below the college level.

1. In passing the Equal Access Act, Congress took issue with the notion that high school students are too impressionable to understand that the school's neutral treatment of a religious club would not constitute official endorsement of religion. The Act, which forbids public secondary schools with "limited open forums" from excluding activities on the basis of their religious content, is premised on a congressional finding that high school students are mature enough to understand the difference between school accommodation of religion and school endorsement.

The Senate Report on the legislation stated: "[t]he Committee finds that students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led, religious speech on the one hand and student-initiated, student-led, religious speech on the other." S. Rep. 98-357, *supra*, 35; see *id.* at 9-10. This "exercise of [the Committee's] fact-finding powers" (*id.* at 9) was based in part on the expert views of psychologists (*id.* at 35), and in part on the testimony of many witnesses, including high school students (*id.* at 10).[7] Supporters

---

[7] For example, a high school student from Sonoma, California testified:

> They also have a smoking section in our school. Does that mean that the school sanctions, supports and encourages smoking? I doubt it, just because the school allows a group to meet, doesn't mean it approves of and supports their activities. The same should hold for religious groups.

Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary,

of the legislation in the House expressed a similar view.[8]

Where Congress has made findings of fact in the discharge of its legislative function, due regard for the separation of powers and for the ability of the legislature to gather information and analyze issues of legislative fact (see *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504-505 (1975)) requires that courts defer to congressional determinations, even for purposes of constitutional adjudication, unless those determinations can be said to be irrational. See, *e.g.*, *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532-533 (1982); *Rostker* v. *Goldberg*, 453 U.S. 57, 74, 80-83 (1981); *Minnesota* v. *Clover Leaf*

98th Cong., 1st Sess. 64 (1983) (testimony of Sarah Scanlon). Another student, from Lubbock, Texas, testified:

> Some people are worried that high school students are very impressionable, and that we can't make decisions and that we are naive. I feel that that is pretty naive on the part of the people who think that. I don't think that is true at all.

Id. at 60 (testimony of Bonnie Bailey). See also, *e.g.*, *ibid.* (testimony of Lisa Bender); *Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 39 (1983) (testimony of C. Luke Thornton, Principal of John I. Leonard High School, Lake Worth, Fla.).

[8] See, *e.g.*, 130 Cong. Rec. H7727 (daily ed. July 25, 1984) (remarks of Rep. Roukema) (disputing claim that "allowing religious groups to meet in the school under any circumstances will have the effect of advancing religion because of the impressionability of high school students" and stating that "studies of adolescent psychology * * * have shown that it is a time of increased cognitive capacity, marked by an ability of the adolescent to differentiate himself from authority figures he depended upon as a younger child"); *id.* at H7724 (remarks of Rep. Frank) ("I regard this as a very auspicious day [for] * * * those of us who think we ought not infantilize teenagers.").

Creamery Co., 449 U.S. 456, 464 (1981); *Brotherhood of Locomotive Firemen* v. *Chicago, R.I. & Pac. R.R.*, 393 U.S. 129, 136, 138-139 (1968); *Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966); *Katzenbach* v. *McClung*, 379 U.S. 294, 299-301 (1964). As Justice Harlan stated in his dissenting opinion in *Katzenbach* v. *Morgan*, 384 U.S. at 668, "[t]o the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to respect." Particularly in this case, where the court of appeals' conclusions regarding student immaturity were based on pure speculation, and where the district judge came to a contrary conclusion, the Congressional findings—based as they were on actual testimony—should carry considerable weight.

2. The decision below conflicts with decisions of this Court and lower courts regarding application of the First Amendment free speech clause to public secondary schools in other contexts. These decisions presuppose that high school students are capable of learning from exposure to a diversity of viewpoints, without confusing free expression with official orthodoxy. See, *e.g.*, *Board of Education* v. *Pico*, 457 U.S. 853 (1982) (plurality); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Seyfried* v. *Walton*, 668 F.2d 214, 219-220 (3d Cir. 1981) (Rosenn, J., concurring); *Russo* v. *Central School District No. 1*, 469 F.2d 623, 633 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973); *James* v. *Board of Education*, 461 F.2d 566, 574 (2d Cir.), cert. denied, 409 U.S. 1042 (1972); *Gambino* v. *Fairfax County School Board*, 429 F. Supp. 731, 736-737 (E.D. Va. 1977); *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1975) (Table).

Moreover, it is the professional educators, not Congress or the courts, who decided that the students of

Williamsport Area High School are capable of participating in the free exchange of ideas characterized by a limited public forum.[9] This decision should not be selectively abrogated by the courts merely because religion is involved.

3. If high school students, unlike college students, would construe approval of a religious club's request for permission to meet as endorsement of religion, why would they not also construe disapproval of the application as official hostility to religion—a result equally at variance with the Establishment Clause? Indeed, the district judge in this case concluded that a policy of singling out religious groups for exclusion from the school's activities period could well be viewed by the students as manifesting official hostility toward religion. Pet. App. 97a.[10]

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[9] The Equal Access Act does not limit the discretion of school officials in deciding whether to create a forum for free expressive activity; it merely provides that, if such a forum is created, the school may not "deny equal access or a fair opportunity" to students "on the basis of the religious, political, philosophical, or other content" of their speech.

[10] The School Board itself apparently recognized that its action might be construed as hostility toward Petros' religious character. The letter from the Board to the students explaining the decision included the following (Pet. App. 6a; C.A. App. A235):

> Please be assured that neither the School Board, nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.

It is not surprising that the Board apprehended that its action might be construed as hostile or discriminatory, since, as the court of appeals noted (Pet. App. 8a), Petros is the only proposed student club or activity ever denied the right to participate in the school's activities period during the memory of the principal.

The impression of state hostility to religion caused by exclusion of religious groups is not unique to this case. In its consideration of the Equal Access Act, Congress heard testimony to that effect from students, and found that many students have in fact perceived their schools' refusal to allow religious activity as manifesting discrimination and official hostility. The Senate Committee concluded that "students reasonably perceive the denial of access for religious speech as State hostility toward religion" (S. Rep. 98-357, *supra*, at 36), and stressed that "[t]he perception of State hostility is not a speculative one created by the Committee, but one held by students as evidenced by the testimony of the students themselves." *Id.* at 11, 19-20.

If it were true that high school students are too immature to appreciate the difference between neutral school actions and endorsement of (or hostility towards) religion, then school officials could not avoid violating the Establishment Clause, whether they granted or denied a request for equal access. *Any* action on a religious group's request for permission to meet would convey a state position regarding the merits of religion, according to this view. The only way out of the dilemma would be for the school to close its limited public forum—that is, to forbid any voluntary student activities on school property. Surely the Constitution does not require such a result.

B. There Is No Other Basis For Distinguishing This Court's Decision In *Widmar* v. *Vincent*

The court of appeals cited several additional grounds for not applying the teaching of *Widmar* v. *Vincent* in this setting. None of these has merit.

1. *Compulsory attendance laws.* Compulsory attendance laws may necessitate some limitations on the speech and conduct of teachers and school officials that might take advantage of the "captive audience"

of public school students. But they provide no basis for limiting the free speech of the students themselves. So long as the students may freely choose among a wide range of activities and topics, there is no compulsion. Indeed, the court of appeals itself acknowledged (Pet. App. 18a):

> [T]he activity period at Williamsport Area High School provides a forum for self-expression, by which students exercise their own discretion in deciding which organizations, if any, to support. Indeed, unlike compulsory instructional classes, which are created and designed by the school authorities, the very existence of such organizations depends entirely upon voluntary student participation and interest.

The released time program sustained by the Court in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), also took place during a period of compulsory attendance; the religious classes to which students were released took attendance and sent back to the public school a list of released students who failed to report for religious instruction. Nevertheless, the Court rejected the charge of coercion, on the ground that "the school authorities are neutral * * * and do no more than release students whose parents so request" (343 U.S. at 311).

2. *Location of the meetings.* The court of appeals also distinguished this case from *Zorach* and *Widmar* on the ground that the meetings took place on school property in a more controlled environment than a university.[11] Therefore, the court concluded, "involuntary contact between nonparticipating students and

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[11] The opinion below states that the club meetings "would be held in a classroom which, a few minutes after the meeting, is also used for regular secular classes" (Pet. App. 26a). In fact, the record shows that the club met in the school cafeteria. C.A. App. A228; Pet. App. 107a.

religious groups is inevitable. Students of differing or conflicting creeds would therefore be less able to overlook the activities of such a group within their school, and by the same token would be more likely to perceive a message of endorsement by school authorities * * *." Pet. App. 26a, 28a. However, the meetings of the religious group involved in *Widmar* also took place on university property, in classrooms and in the student center (454 U.S. at 265 n.2). The Williamsport Area High School is located on a 147-acre campus and has 2,500 students—a size comparable to many smaller college campuses. Some 25 other clubs were authorized to meet during activities period, in addition to other competing activities (homeroom, computer station, career counseling and library), as compared to some 100 clubs in *Widmar* (not necessarily all meeting at the same time). In addition, the club in this case has agreed to forego usual school bulletin boards and other organs of publicity (a restriction not undertaken in *Widmar*). In short, there is no basis for concluding that Petros was any more "visible" than the club involved in *Widmar* or similar clubs at other college campuses.[12]

3. *Presence of adult monitor.* The court of appeals concluded (Pet. App. 26a-27a) that the required presence of an adult monitor "necessarily must impart

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[12] There is no merit to the court of appeals' reliance (Pet. App. 27a-28a, 31a) on *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948). As this Court stated in *Widmar*, 454 U.S. at 271-272 n.10 (emphasis in original):

> Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. See, *e.g.*, *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

the impression to students that the school's authority and that the school's endorsement is implicated in the relevant activity, since every monitor must be approved by the school." However, the record makes clear that the only function of the monitor is to take attendance and to maintain order. The district court correctly concluded that "[i]nasmuch as the teacher would be present only to ensure orderly meetings, the instant situation would involve no more entanglement than when a state provides for 'the safety, security and general convenience' for persons attending the celebration of a Mass at the National Mall; or provides police and fire protection to a church" (Pet. App. 99a-100a (footnote and citations omitted)).

4. *Excessive entanglement.* The court of appeals concluded that the club's commitment not to use the school's newspaper, bulletin boards, or public address system—a commitment not made in *Widmar*—would entail "excessive entanglement" (Pet. App. 33a-34a). However, this purported distinction is based on a misunderstanding. The court of appeals apparently understood the students' commitment as distinguishing between "religiously oriented material" and other announcements (*id.* at 33a); this would require the school officials "to interpret the posted announcements in order to distinguish religious from non-religious content" (*id.* at 34a). However, the club's commitment was to forego *all* use of the bulletin board, public address system or newspaper to publicize their meetings—a commitment which, as Judge Adams pointed out (*id.* at 59a), "represents a simple, easily-administered rule" that does not require the school authorities to distinguish religious from non-religious content.

Indeed, as Judge Adams observed, enforcing a ban against religious meetings could prove to be far more "entangling" (Pet. App. 59a). Cf. *Walz* v. *Tax Com-*

mission, 397 U.S. 664, 674-675 (1970) (granting tax exemptions to churches gives rise to lesser government involvement than would taxing them). For example, assume that the students involved in Petros, or other students of a known religious orientation, were to form a Philosophy and Ethics Club. How could the school be sure that this club was not a "cover" for religious meetings? Presumably the adult monitor would have to keep a close and continuous watch over what the students said and did at each meeting to "determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove to be an 'impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" *Widmar*, 454 U.S. at 272 n.11. In essence, the school would have to assume a continuing role of religious censorship over such a club's meeting—a role totally offensive to the values of the First Amendment.

C. Allowing Petros Meetings Would Be Consistent With The Fundamental Principles Of The First Amendment

The Establishment Clause, no less than the Free Exercise Clause, was intended to advance the cause of individual choice and religious liberty. The focus of the Establishment Clause is on prohibiting government establishment of a religious orthodoxy; on promoting "diversity and pluralism in all areas." *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 8. The drafters of the Bill of Rights had no intention to place religionists or religious speech under any special disabilities, even within the public arena. See *McDaniel* v. *Paty*, 435 U.S. 618, 637, 641 (1978) (Brennan, J., concurring).

Indeed, it is no exaggeration to state that the result below is *directly contrary* to the original in-

tent, and that it interprets the Establishment Clause in a manner expressly feared and sought to be avoided by its drafters. The principal point of criticism of the early drafts of the Establishment Clause by members of the First Congress was that it might be interpreted in a way that would be "extremely hurtful to the cause of religion." 1 *Debates and Proceedings in the Congress of the United States* 758 (Aug. 15, 1789) (J. Gales ed. 1834) (remarks of Rep. Huntington); see also *id.* at 757 (remarks of Rep. Sylvester). The response of James Madison, principal author of the draft Amendment, was that "the object it was intended to prevent" was that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform" (*id.* at 758-759; see also *id.* at 758). A policy of equal access for all groups is precisely the ideal envisioned by the Founders. An exclusion of religious groups from a forum otherwise open to all offends the very core of the First Amendment. *Widmar* v. *Vincent*, *supra*; *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); see generally M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 6-17 (1978).

This case does not require the Court to explore the limits of affirmative accommodation of religion; the student petitioners ask only that they be treated in the same way as any other student group. See *Widmar* v. *Vincent*, 254 U.S. at 273 n.13. They seek tolerance, equal treatment, nondiscrimination. This case thus touches on the values of the First Amendment at a particularly profound and sensitive level. The question whether, in this setting, the Establishment Clause authorizes the singling out of religious speech for direct discriminatory prohibition is one that this Court should promptly decide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 84-773 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 13, 1984
CERTIORARI GRANTED FEBRUARY 19, 1985

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 83-3284

BENDER, Lisa; BRAGGS, Morris, A Minor, By BRAGGS, Mrs. Mary, His Guardian Ad Litem; ROBB, Toni, KRINER, Robin; HUNTER, Kerri, a Minor, by HUNTER, Mr. & Mrs. Carl, her guardians Ad Litems; HERZOG, Brenda Kay, A Minor, by HERZOG, Mr. and Mrs. Louis, Her Guardian Ad Litem; SEEVERS, Shawn, a Minor by SEEVERS, Mr. and Mrs. Gerald, His Guardian Ad Litems; STRAYER, Peter, a Minor, by STRAYER, Mr. and Mrs. Charles; His Guardian Ad Litems; BROSSMAN, Bruce, a Minor by BROSSMAN, Mr. and Mrs. Bruce, His Guardian Ad Litems, and MARSHALL, Denise, a Minor by MARSHALL, Mr. and Mrs. Dennis, Her Guardian Ad Litems and All Others Similarly Situated

vs.

THE WILLIAMSPORT AREA SCHOOL DISTRICT; OSCAR KNADE, SUPERINTENDENT OF WILLIAMSPORT AREA SCHOOL DISTRICT; RICHARD F. EBERHART, PRESIDENT OF THE WILLIAMSPORT AREA SCHOOL BOARD; JANET C. HARRISON, MEMBER OF THE WILLIAMSPORT AREA SCHOOL BOARD; G. KENT BITNER, MEMBER OF THE WILLIAMSPORT AREA SCHOOL BOARD; ARTHUR E. DUNCAN, MEMBER WILLIAMSPORT AREA SCHOOL BOARD; JOYCE S. HERSHBERGER, MEMBER, WILLIAMSPORT AREA SCHOOL BOARD; RICHARD L. MERK, MEMBER WILLIAMSPORT AREA SCHOOL BOARD; GENE SMITH, MEMBER WILLIAMSPORT AREA SCHOOL BOARD; KERMIT SMITH, MEMBER, WILLIAMSPORT AREA SCHOOL BOARD; JOHN C. YOUNGMAN, JR., MEMBER WILLIAMSPORT AREA SCHOOL BOARD; WAYNE A. NEWTON, PRINCIPAL WILLIAMSPORT AREA HIGH SCHOOL

JOHN C. YOUNGMAN, JR., one of the Defendants,
Appellant

(D.C. Civil No. 82-692)

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1983	
Sept. 12	Appellees' request for oral argument, filed. Send to merits panel.
Sept. 13	Disclosure statement of amicus curiae, Catholic League for Religious and Civil Rights, filed.
Sept. 19	Disclosure Statement of amici curiae, Baptist Joint Committee on Public Affairs and The National Assoc. of Evangelicals, filed.
Sept. 21	Disclosure Statement of amici curiae, American Jewish Congress and Anti-Defamation League of B'Nai Brith, filed.
Sept. 21	Motion by Amici Curiae American Jewish Congress and Anti-Defemation League of B'Nai Brith for leave to participate in oral argument, w/svc., filed. Send to Merits Panel.
Oct. 3	Disclosure Statement of Amici Curiae, Americans United for Separation of Church and State, filed.
Dec. 2	Motion by appellees, The Williamsport Area School District, et al., pursuant to Rule 21, Federal Rules of Civil Procedure, to add parties as appellees, w/svc., filed.
Dec. 7	Submitted on above motion. Coram; Send to Merits.
Dec. 29	Letter dated 12/22/83, from Samuel E. Ericsson, Esq., co-counsel for appellee, w/enclsure, rec'd for the information of the Court, (not filed unless the Ct. directs.)
[1984]	
Aug. 15	Order (Aldisert, Ch.J., Seitz, Adams, Gibbons, Hunter, Weis, *Garth*, Higginbotham, Sloviter & Becker, C.J.s., & Brotman, D.J.) denying petition for rehearing. Judge Gibbons would grant the petition for rehearing, filed.

DATE	FILINGS—PROCEEDINGS
1984	
Aug. 15	Amended Order (Aldisert, Ch.J., Seitz, Adams, Gibbons, Hunter, Weis, *Garth*, Higginbotham, Sloviter & Becker, C.Js, & Brotman, D.J.) denying petition for rehearing. Judges Gibbons and Weis would grant the petition for rehearing, filed.
Aug. 22	Motion by appellee to stay mandate to and including November 13, 1984, w/serv. filed.
Nov. 15	Petition for writ of certiorari to the U.S. Supreme Court and Appendix to the petition for writ of cert. from counsel for petitioner w/certificate of serv. Received. (sa)
1985	
Jan. 10	Copy of letter dated January 4, 1985, form Ms. Nancy Zajac, Managing Editor. Received. (sa)
Jan. 16	Letter dated 1/16/85 to Ms. Zajac advising the Court has written West Publishing Company in reference to the incorrect designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0698

BENDER, Lisa; BRAGGS, Morris, A Minor, By BRAGGS, Mrs. Mary, His Guardian Ad Litem; ROBB, Toni, KRINER, Robin; HUNTER, Kerri, a Minor, by HUNTER, Mr. & Mrs. Carl, her guardians Ad Litems; HERZOG, Brenda Kay, A Minor, by HERZOG, Mr. and Mrs. Louis, Her Guardian Ad Litem; SEEVERS, Shawn, a Minor by SEEVERS, Mr. and Mrs. Gerald, His Guardian Ad Litems; STRAYER, Peter, a Minor, by STRAYER, Mr. and Mrs. Charles; His Guardian Ad Litems; BROSSMAN, Bruce, a Minor by BROSSMAN, Mr. and Mrs. Bruce, His Guardian Ad Litems, and MARSHALL, Denise, a Minor by MARSHALL, Mr. and Mrs. Dennis, Her Guardian Ad Litems and All Others Similarly Situated,

Plaintiffs,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT; OSCAR KNADE, SUPERINTENDENT OF WILLIAMSPORT AREA SCHOOL DISTRICT; RICHARD F. EBERHART, PRESIDENT OF THE WILLIAMSPORT AREA SCHOOL BOARD; JANET C. HARRISON, MEMBER OF THE WILLIAMSPORT AREA SCHOOL BOARD; G. KENT BITNER, MEMBER OF THE WILLIAMSPORT AREA SCHOOL BOARD; ARTHUR E. DUNCAN, MEMBER WILLIAMSPORT AREA SCHOOL BOARD; JOYCE S. HERSHBERGER, MEMBER, WILLIAMSPORT AREA SCHOOL BOARD; RICHARD L. MERK, MEMBER WILLIAMSPORT AREA SCHOOL BOARD; GENE SMITH, MEMBER WILLIAMSPORT AREA SCHOOL BOARD; KERMIT SMITH, MEMBER, WILLIAMSPORT AREA SCHOOL BOARD; JOHN C. YOUNGMAN, JR., MEMBER WILLIAMSPORT AREA SCHOOL BOARD; WAYNE A. NEWTON, PRINCIPAL WILLIAMSPORT AREA HIGH SCHOOL,

Defendants.

28 U.S.C. 1331, 1343—Defendants violated plaintiffs First Amendment Rights of Freedom of Speech and Religion and the free exercise thereof.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1982		
June 2	1	COMPLAINT—
" "		NOTICE & CONSENT FORM—re Magistrate Referral handed to Atty.
" "	2	MOTION—of plaintiff for special appointment to serve process, and
" "		ORDER—appointing Ernst Strosahl to serve the complaint on defendants. Copy to Atty.
" "	3	SUMMONS—issued and together with consent forms to Atty. Seevers office.
" "		J.S. 5 (Original docket to Judge Muir)
June 8	4	MEMO FROM WMSPT DEPUTY—Judge M cannot take case. Knows parties.
June 8		CASE REASSIGNED—to Judge Nelson mep
June 9		SUMMONS—returned with affidavit by Ernst F. Strosahl stating that on June 4, 1982 he served the summons and complaint on John C. Youngman, Jr., Wayne Newton, Oscard W. Knade, Jr., John Vohdon, School District Secr., Richard F. Eberhart, Janet C. Harrison, Kent G. Bittner, Arthur E. Duncan, Joyce S. Hershberger, Richard L. Merk, Gene Smith and Kermit O. Smith.
June 22	5	MOTION—of defendants Williamsport Area School District Et, Al for enlargement of time to file responsive pleading, and C. of S. and

DATE	NR.	PROCEEDINGS
1982		
June 22		ORDER—It is hereby ordered that the relief requested by the Motion is granted and that said defts are given an extension of 20 days from the date when a responsive pleading to the complaint would have been due to file said responsive pleading i.e. until July 17, 1982. (N) Copies to Bahl, Stuart, and Seevers.
July 16	6	ANSWER—of defendants The Williamsport Area School District, et al to plaintiffs' complaint for declaratory and injunctive relief, and C of S.
July 19	7	MOTION—of defendants, The Williamsport Area School District, et al for Summary Judgment, and
" "		STATEMENT—of Material Facts Not in Dispute, and
" "		CERTIFICATE—of NonConcurrence, and C of S.
" "	8	AFFIDAVIT—of Oscar W. Knade, Jr., defendant in support of Motion for Summary Judgment.
" "	9	BRIEF—of defendant, Williamsport Area School District, et al sin support of its Motion for Summary Judgment, and C of S.
July 28	10	MOTION—of plaintiffs, Lisa Bender, et al for enlargement of time to file responsive brief, and .
" "		CERTIFICATE—of Concurrence, and C of S.
July 28		ORDER—that the relief requested by the motion is granted and that said plaintiffs are given an extension of thirty days from the date when a responsive Brief to the

DATE	NR.	PROCEEDINGS
1982		
		motion for summary judgment would have been due to file said responsive brief, until September 3, 1982. attached to doc 10. Copies to Bahl, Stuart, and Seevers.
Aug. 10	11	NOTICE—of plaintiffs, to take the depositions of Oscar Knade, and Wayne Newton, on August 24, 1982 at 9:30 a.m. in Williamsport, Pa. jfg
Sept. 3	12	MOTION—of pltfs for summary judgment & cert of nonconcurrence & c of s.
" "	13	BRIEF—of pltfs in support of motion for summary judgment & c of s.
" "	14	AFFIDAVIT—of atty for pltfs that he personally communicated w/counsel of Lubbock Independent School District & was informed that the district has filed writ of certiorari to US Supreme Ct of decision of 5th circuit ct of appeals.
" "	15	AFFIDAVIT—of pltf Lisa Bender, pltf.
" "	16	TRANSCRIPT—of deposition of Wayne A. Newton & Oscar Knade taken. —by pltfs on 8/24/82 in Wmspt.
Sept. 10	17	MOTION—of defts Williamsport High School Dist et al for enlargement of time to file responsive brief & cert. of concurrence & c of s.
Sept. 13		ORDER—that defts are given an extension of time until 10/4/82 to file responsive brief & to respond to affidavits & statement of material facts submitted by pltfs. (N) CC to counsel from CO.

DATE	NR.	PROCEEDINGS
1982		
Oct. 6	18	REPLY BRIEF—of defendants Williamsport Area School District, et al in support of its Motion for Summary Judgment and contra plaintiffs' Motion for Summary Judgment, and C of S.
Oct. 14	19	REPLY BRIEF—of plaintiff to Defendants Brief in Opposition to plaintiff's Motion for Summary Judgment, and C of S.
Nov. 9	20	ORDER—presently pending before court are cross-motions for summary judgment. Record is incomplete as to exact nature of activity period, type of activities or clubs that have been & would be approved & what proposed groups if any have been denied approval. Ordered that parties shall submit affidavits within 15 days of this order addressing questions identified in this order & any other info deemed appropriate. (N) CC to counsel of record from N's.
Nov. 24	21	AFFIDAVIT—of Wayne E. Newton, Principal of Wmsp. Area High School.
Nov. 23	22	AFFIDAVIT—of GERALD W. SEEVERS, ATTY. FOR PLTFS. C OF S.
Nov. 23	23	SUPPORTING—Exhibit—COPY OF WRIT OF CERTIORARI FILED BY LUBBOCK INDEPENDENT SCHOOL DISTRICT. C OF S. br
1983		
May 6	24	AFFIDAVIT—of Lisa Carol Bender, plf in support of complaint.
May 6	25	STIPULATION—of counsel re Faculty Advisors & Bulletin Board & Public Address System, and

DATE	NR.	PROCEEDINGS
1983		
May 6		ORDER—of Court, approving stipulation. copies to Counsel of Record from Scr. office.
May 12	26	OPINION/—of Judge Nealon. CC to counsel from N's. Orig in vault.
May 12	27	ORDER—(1) summary judgment is granted in favor of the defts & against pltfs on pltfs free exercise claim (2) summary judgment is granted in favor of pltfs & against defts on pltfs freedom of speech claim (3) clerk shall close case. (N) CC to counsel from N's office. Orig in vault.
" "		JS 6
June 10	28	PRAECIPE—for appearance of John C. Youngman, Jr., Esq. as counsel for John C. Youngman, Jr. one of the defts in this matter.; C. of S.
June 10	29	NOTICE—of Appeal, filed by Atty Youngman, Jr., from Order of Court of May 12, 1983. ($70.00 Fee Pd) Copy to Seevers, Ericksson, Stuart, Bahl, Youngman, Jr. and Court with T/L; and to Court of Appeals with T/L, C/C of order of May 12, 1983 and c/c of docket.
June 16	30	TPO—signed by Atty Youngman, Jr. stating a transcript is already on file.
June 20		RECORD COMPLETE FOR PURPOSE OF APPEAL.
June 20		CERTIFIED COPY OF DOCKET ENTRIES SENT IN LIEU OF RECORD.
June 21	31	LETTER(COPY)—from ct of appeals to Atty Youngman dated 6/20/83—appeal docketed to CA # 83-3284. Info cc to J. Nealon from Scr. CO.

DATE	NR.	PROCEEDINGS
1983		
June 23	32	RECEIPT—for cert. copy of docket entries in lieu of record received by Ct. of Appeals on 6/22/83.
Aug. 12	33	BILL OF COSTS—and attorneys Fees filed by atty for plfs; and AFFI.—of Gerald W. Seevers in support; C. of S.
Sept. 2	34	OBJECTIONS—of Defendants to Plaintiffs' Bill of Costs and Attorneys' fees, and C of S.
Sept. 13	35	REPLY—of plfs to the Defts OBjections to Plfs' Bill of Costs and Attorneys Fees; C. of S.
Sept. 15	36	REPLY—of pltfs to defts' objections to pltf's bill of costs & attys' fees & supplement to pltfs' petition w/affidavit of Atty Samuel E. Ericsson attached thereto & c of s.
Sept. 23	37	BRIEF—of defts in opposition to pltfs' reply to defts' objections & c of s.
Dec. 14	38	MEMO—of Judge Nealon; and ORDER—IT IS HEREBY ORDERED THAT: the instant petition for costs and attorneys' fees shall be held in abeyance pending the outcome of the appeal presently before the Court of Appeals in the above captioned matter. (N) Copies to attys.
1984		
Aug. 14	39	LETTER—to Judge Nealon from Atty Bahl dated 8/13/84 Re: Status Report from defts.

DATE	NR.	PROCEEDINGS
1984		
Aug. 20	40	INFO—Sheet from U.S. Court of Appeals: An order was filed on August 15, 1984 denying the petitioner's rehearing. jfg
Aug. 30	41	S/BRIEF—of defendants in support of its objections to plaintiffs bill of costs and Attorney's fees, and C. of S. jfg
Sept. 4	42	INF.—sheet from Court of Appeals on post decision matters; An Order was filed on 8/28/84 staying the issuance of the mandate to 11/13/84 pending the filing of a petition for writ of certiorari in the Supreme Court of the United States. Inf. copy to Judge Nealon.
Sept. 12	43	LETTER—dated 9/11/84 from Atty Samuel E. Ericson to J. Nealon re: pltfs request that court take no further action on petition for costs & attys fees until final disposition by Supreme Court of U.S. w/attachments thereto & c of s.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 82-0692

LISA BENDER; MORRIS BRAGGS, A MINOR, BY MRS. MARY BRAGGS, HIS GUARDIAN AD LITEM; TONI ROBB; ROBIN KRINER; KERRI HUNTER, A MINOR, BY MR. AND MRS. CARL HUNTER, HER GUARDIANS AD LITEMS; BRENDA KAY HERZOG, A MINOR, BY MR. AND MRS. LOUIS HERZOG, HER GUARDIAN AD LITEM; SHAWN SEEVERS, A MINOR, BY MR. AND MRS. GERALD SEEVERS, HIS GUARDIAN AD LITEMS; PETER STRAYER, A MINOR, BY MR. AND MRS. CHARLES STRAYER, HIS GUARDIAN AD LITEMS; BRUCE BROSSMAN, A MINOR, BY MR. AND MRS. BRUCE BROSSMAN, HIS GUARDIAN AD LITEMS, AND DENISE MARSHALL, A MINOR, BY MR. AND MRS. DENNIS MARSHALL, HER GUARDIAN AD LITEMS, AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

THE WILLIAMSPORT AREA SCHOOL DISTRICT; OSCAR KNADE, SUPERINTENDENT OF WILLIAMSPORT AREA SCHOOL DISTRICT; RICHARD F. EBERHART, PRESIDENT OF THE WILLIAMSPORT AREA SCHOOL BOARD; JANET C. HARRISON, MEMBER OF THE WILLIAMSPORT AREA SCHOOL BOARD; G. KENT BITNER, MEMBER OF THE WILLIAMSPORT AREA SCHOOL BOARD; ARTHUR E. DUNCAN, MEMBER WILLIAMSPORT AREA SCHOOL BOARD; JOYCE S. HERSHBERGER, MEMBER, WILLIAMSPORT AREA SCHOOL BOARD; RICHARD L. MERK, MEMBER WILLIAMSPORT AREA SCHOOL BOARD; GENE SMITH, MEMBER WILLIAMSPORT AREA SCHOOL BOARD; KERMIT SMITH, MEMBER, WILLIAMSPORT AREA SCHOOL BOARD; JOHN C. YOUNGMAN, JR., MEMBER WILLIAMSPORT AREA SCHOOL BOARD; WAYNE A. NEWTON, PRINCIPAL WILLIAMSPORT AREA HIGH SCHOOL,

Defendants.

[Filed June 2, 1982]

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COME NOW, the Plaintiffs, by counsel, and state their cause of action as follows:

1. This is an action for declaratory judgment and permanent injunction, brought by students in the Williamsport High School, through the parents of those students who are minors, and on behalf of all others similarly situated, against the Williamsport Area School District, hereinafter, "the District", the Superintendent of the District, The President, and each member of the School Board of the District, in their individual and official capacities.

2. The Court has jurisdiction over this action under 28 U.S.C. § 1331 and 1343, and 42 U.S.C. § 1983 and 1985. The amount in controversy exceeds the sum of Ten Thousand ($10,000.0) Dollars exclusive of interests and costs.

3. Venue resides on this Court pursuant to 28 U.S.C. § 1391.

4. Plaintiff, Lisa Bender, age 18, resides at R. D. # 2, Box 33, Linden, Lycoming County, Pennsylvania. She is enrolled in the twelfth grade at Williamsport Area High School, Williamsport, Pennsylvania.

5. Plaintiff, Morris Braggs, age 17, resides at 513 Park Avenue, Lycoming County, Williamsport, Pennsylvania. He is enrolled in the twelfth grade at Williamsport Area High School, Williamsport, Pennsylvania. He brings this action by and through Mary Braggs, his mother and natural guardian.

6. Plaintiff, Toni Robb, age 19, resides at R.D. # 3, Cogan Station, Lycoming County, Pennsylvania. She is enrolled in the twelfth grade at Williamsport Area High School, Williamsport, Pennsylvania.

7. Plaintiff, Robin Kriner, age 18, resides at R. D. # 1, Box 31, Cogan Station, Lycoming County, Pennsylvania. She is enrolled in the twelfth grade at Williamsport Area High School, Williamsport, Pennsylvania.

8. Plaintiff, Kerri Hunter, age 17, resides at 2128 Hillside Avenue, Williamsport, Lycoming County, Pennsylvania. She is enrolled in the twelfth grade at Williamsport Area School District, Williamsport, Pennsylvania. She brings this action by and through Mr. and Mrs. Carl Hunter, her parents and natural guardians.

9. Plaintiff, Brenda Kay Herzog, age 17, resides at 710 Funston Avenue, Williamsport, Lycoming County, Pennsylvania. She is enrolled in the twelfth grade at Williamsport Area School District, Williamsport, Pennsylvania. She brings this action by and through Mr. and Mrs. Louis Herzog, her parents and natural guardians.

10. Plaintiff, Shawn Seevers, age 17, resides at 2532 Grand Street, Williamsport, Lycoming County, Pennsylvania. He is enrolled in the eleventh grade at Williamsport Area School District, Williamsport, Pennsylvania. He brings this action by and through Mr. and Mrs. Gerald Seevers, his parents and natural guardians.

11. Plaintiff, Peter Strayer, age 16, resides at 1028 West Fourth Street, Williamsport, Lycoming County, Pennsylvania. He is enrolled in the eleventh grade at Williamsport Area School District, Williamport, Pennsylvania. He brings this action by and through Mr. and Mrs. Charles Strayer, his parents and natural guardians.

12. Plaintiff, Bruce Brossman, age 17, resides at 835 Race Street, Williamsport, Lycoming County, Pennsylvania. He is enrolled in the eleventh grade at the Wil-

liamsport Area School District, Williamsport, Pennsylvania. He brings this action by and through Mr. and Mrs. Bruce Brossman, his parents and natural guardians.

13. Plaintiff, Denise Marshall, age 16, resides at 1501 Princeton Avenue, Williamsport, Lycoming County, Pennsylvania. She is enrolled in the eleventh grade at the Williamsport Area School District, Williamsport, Pennsylvania. She brings this action by and through Mr. and Mrs. Dennis Marshall, her parents and natural guardians.

DEFENDANTS

14. Dr. Oscar Knade, is Superintendent of the Williamsport School District and is sued in that capacity.

15. The Willamsport Area School District is the governmental agency created under the laws of the Commonwealth of Pennsylvania charged with providing public education within the boundaries of the City of Williamsport, Townships of Old Lycoming, Lycoming, Woodward, Hepburn, and Lewis.

16. Richard F. Eberhart, is the President of the Williamsport School Board, and is sued in that capacity.

17. Janet C. Harrison is a member of the Williamsport Area School Board and is sued in that capacity.

18. G. Kent Bitner, is a member of the Williamsport Area School Board and is sued in that capacity.

19. Arthur E. Duncan is a member of the Williamsport Area School Board and is sued in that capacity.

20. Joyce S. Hershberger is a member of the Williamsport Area School Board and is sued in that capacity.

21. Richard L. Merk is a member of the Williamsport Area School Board and is sued in that capacity.

22. Gene Smith is a member of the Williamsport Area School Board and is sued in that capacity.

23. Kermit Smith is a member of the Williamsport Area School Board and is sued in that capacity.

24. John C. Youngman, Jr., is a member of the Williamsport Area School Board and is sued in that capacity.

25. Wayne A. Newton is Principal of the Williamsport Area High School and is sued in that capacity.

COUNT I

26. The Williamsport Area High School allows students to join and participate in groups called student clubs.

27. Policies of the Williamsport Area High School allow student clubs in areas such as student government, Key Club, Language Clubs, Chess Club, Peer Helpers, and Political Club.

28. The Williamsport Area High School allows student clubs to meet from 7:55 a.m. to 8:23 a.m. each Tuesday and Thursday mornings during the regularly scheduled activity period.

29. The Williamsport Area High School allows student clubs to meet before and after school hours, which are defined as the hours during which classes are held, 7:45 a.m., through 2:23 p.m.

30. Williamsport Area High School allows student clubs in which students exchange ideas and personal opinions on topics of politics, history, community service, cultural differences, personal growth and development.

31. On or about September 15 and September 22, 1981, a group of students enrolled in Williamsport Area High School made a request to reorganize [sic] and allow meetings of a student club to be called "Petros", which would meet for the purposes of aiding each other in his or her social, emotional and intellectual personal growth and development by prayer, the application of God's Holy Word to their problems and sharing of personal experiences, during the student activity period on Tuesday and Thursday.

32. Wayne A. Newton, Principal of the Williamsport Area High School and Dr. Oscar Knade, Superintendent of the District denied recognition and permission for the Petros group to meet on the grounds its meetings would be religious in content.

33. The students who requested to meet in the Petros group petitioned the Williamsport Area School Board on January 2, 1982, for recognition and permission to meet. These requests were denied.

34. The denial by defendants of plaintiffs' request for recognition and permission to meet on grounds of the religious content of the proposed meetings, violates the right of plaintiffs under the First Amendment to the Constitution of the United States, to exercise freedom of speech without regulation or restriction by the state imposed on the basis of the content of the speech.

COUNT II

35. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 34 above.

36. Defendants' discrimination based on the content of speech of plaintiffs' proposal [sic] meetings violates civil rights guaranteed to plaintiffs under 42 U.S.C. § 1983.

COUNT III

37. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 36 above.

38. Defendants have coordinated and cooperated among themselves to perform the actions alleged above, thus conspiring to violate civil rights of the plaintiffs in violation of 42 U.S.C. § 1985.

COUNT IV

39. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 38 above.

40. Plaintiffs are Christians who believe they have a duty to perform all tasks in school to the glory of God, to pray during the day, including the school day, to worship with their fellow Christians and to share with each other how their religious faith aids them with their daily problems.

41. The rights and privileges requested by plaintiffs for their proposed meetings are the same as the rights and privileges routinely accorded to other student groups for expression of ideas with non-religious content.

42. Defendants' refusal to allow plaintiffs to hold their proposed meetings violated the rights of plaintiffs to the free exercise of their religious beliefs under the First Amendment to the Constitution of the United States, and constitutes a failure to give reasonable accommodation to the religious beliefs of plaintiffs.

COUNT V

43. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 42 above.

44. The above-alleged actions of defendants violate the right of plaintiffs to the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

COUNT VI

45. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 44 above.

46. The above-alleged actions by defendants violates the prohibition of the Establishment Clause of the First Amendment to the Constitution of the United States against state hostility toward religion.

COUNT VII

47. Plaintiffs incorporate by reference the allegations contained in paragraph 1 through 46 above.

48. The above-alleged actions by defendants violates Article 1 Sections 3 and 7 of the Constitution of the Commonwealth of Pennsylvania.

CLASS ACTION ALLEGATIONS

49. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 48 above.

50. This suit is maintainable as a class action under Federal Rule of Civil Procedure 23(a) and 23(b) 1 and 2.

51. The number of students who belong to said class are at least forty-five (45) but can include the number of students who wish to engage in prayer during the school day which could be over two thousand (2,000) students.

52. The class in this action consists of all students enrolled in Williamsport Area High School who seek to engage in voluntary religious activity within the boundaries of the school property.

53. The named plaintiffs are adequate representatives of the class because they are similarly situated in all material respects with other class members.

54. The members of the class have in common the following questions of law and fact:

1. All facts concerning the matter of the school and the facilities sought to be used are common to all class members;

2. There is a common question of law whether the students have a constitutional right under the Freedom of Speech Clause of the First Amendment of the United States Constitution. This includes Freedom of Speech and Assembly concerning religious matters;

3. Whether the students have a free exercise of religious rights regarding Speech and Assembly;

4. Whether the School may defend its policies by referring to the Establishment Clause of the First Amendment of the United States Constitution.

55. This class action is maintainable under Rule 23 (b) 1, because separate actions by individual students seeking to engage in voluntary religious activity could establish incompatible standards of conduct for the school, and could be dispositive of the interests of similarly situated students not parties to the case.

56. This class action is maintainable under Rule 23 (b) 2, because the school policies against voluntary religious activity is based on grounds generally applicable to the entire class and the requested relief is appropriate with respect to the class as a whole.

CLAIMS FOR RELIEF

57. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray that the following relief be granted.

A. That the Court declare that the actions of defendants, in denying the recognition and permission for plaintiff students to meet in the group "Petros", is contrary to the First and Fourteenth Amendment to the Constitution of the United States, and contrary to Article I Sections 3 and 7 of the Constitution of the Commonwealth of Pennsylvania.

B. That the Court permanently enjoin defendants from denying to Plaintiffs recognition and permission to enact [sic] as a student club based on the religious content of their proposed meetings.

C. That the Court issue a permanent injunction requiring defendants to allow plaintiffs to meet on the same

terms as other student clubs, with a faculty advisor to be present at meetings solely for purposes of ensuring good order and not for any purpose related to the religious content of the meetings.

D. That the Court allow the Plaintiffs their costs therein and reasonable attorneys fees pursuant to 42 U.S.C. § 1988.

E. That the Court grant such other relief as in the interests of justice and equity may be required.

Respectfully Submitted,

WILLIAMS and SEEVERS

By /s/ Gerald W. Seevers
GERALD W. SEEVERS
Attorney for Plaintiffs
57 E. Fourth St. P.O. Box 3
Williamsport, PA 17703-0003
(717) 323-8568

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

ANSWER OF DEFENDANTS THE WILLIAMSPORT AREA SCHOOL DISTRICT, ET AL TO PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. It is admitted that the Complaint as filed purports to be an action for declaratory judgment and permanent injunction, brought by students of the Williamsport High School, through the parents of those students who are minors, and on behalf of all others similarly situated against the said named defendants. Plaintiffs' right to recover under any such cause of action is, however, specifically denied.

2. Admitted, but Plaintiffs' right to recover against Defendants is denied.

3. Admitted, but Plaintiffs' right to recover against said Defendants is denied.

4. Admitted in part and denied in part. It is admitted that Plaintiff Lisa Bender was enrolled in the twelfth grade at the Williamsport Area High School on the date of filing of the Complaint. It is denied, however, that she is currently enrolled in the twelfth grade or any grade whatsoever at the Williamsport Area High School. For further answer, see the affirmative defenses contained herein.

5. Admitted in part and denied in part. It is admitted that Plaintiff Morris Braggs was enrolled in the twelfth grade at the Williamsport Area High School on the date of filing of the Complaint. It is denied, however, that he is currently enrolled in the twelfth grade or any grade whatsoever at the Williamsport Area High School. For

further answer, see the affirmative defenses contained herein.

6. Admitted in part and denied in part. It is admitted that Plaintiff Tony Robb was enrolled in the twelfth grade at the Williamsport Area High School on the date of filing of the Complaint. It is denied, however, that he is currently enrolled in the twelfth grade or any grade whatsoever at the Williamsport Area High School. For further answer, see the affirmative defenses contained herein.

7. Admitted in part and denied in part. It is admitted that Plaintiff Robin Kriner was enrolled in the twelfth grade at the Williamsport Area High School on the date of filing of the Complaint. It is denied, however, that she is currently enrolled in the twelfth grade or any grade whatsoever at the Williamport Area High School. For further answer, see the affirmative defenses contained herein.

8. Admitted in part and denied in part. It is admitted that Plaintiff Kerri Hunter was enrolled in the twelfth grade at the Williamsport Area High School on the date of filing of the Complaint. It is denied, however, that she is currently enrolled in the twelfth grade or any grade whatsoever at the Williamsport Area High School. For further answer, see the affirmative defenses contained herein.

9. Admitted in part and denied in part. It is admitted that Plaintiff Brenda Kay Herzog was enrolled in the twelfth grade at the Williamsport Area High School on the date of filing of the Complaint. It is denied, however, that she is currently enrolled in the twelfth grade or any grade whatsoever at the Williamsport Area High School. For further answer, see the affirmative defenses contained herein.

10. Admitted, but Plaintiffs' right to recover against said Defendants is denied.

11. Admitted, but Plaintiffs' right to recover against said Defendants is denied.

12. Admitted, but Plaintiffs' right to recover against said Defendants is denied.

13. Admitted, but Plaintiffs' right to recover against said Defendants is denied.

14. Admitted, but Plaintiffs' right to recover against said Defendants is denied.

15. Admitted, but Plaintiff's right to recover against said Defendant is denied.

16. Admitted, but Plaintiffs' right to recover against said Defendant is denied.

17. Admitted, but Plaintiffs' right to recover against said Defendant is denied.

18. Admitted, but Plaintiffs' right to recover against said Defendant is denied. Furthermore, said individual's name is G. Kent Bittner.

19. Admitted, but Plaintiffs' right to recover against said Defendant is denied.

20. Admitted, but Plaintiffs' right to recover against said Defendant is denied.

21. Admitted, but Plaintiffs' right to recover against said Defendant is denied.

22. Admitted, but Plaintiffs' right to recover against said Defendant is denied.

23. Admitted, but Plaintiffs' right to recover against said Defendant is denied.

24. Admitted, but Plaintiffs' right to recover against said Defendant is denied.

25. Admitted, but Plaintiffs' right to recover against said Defendant is denied.

26. Admitted in part and denied in part. It is admitted that the Williamsport Area High School and the School District of which it is a part does permit, under certain circumstances, students to join and participate in groups called student clubs. The said Williamsport Area High School does not permit, however, students to join in and participate in clubs which are unlawful, unconstitutional or otherwise deemed inappropriate as school sponsored activities for its students.

27. Admitted in part and denied in part. Members of the student government are elected, members of the Peer Helpers are selected; all student organizations are lawful, constitutional and deemed appropriate as school sponsored activities.

28. Admitted in part and denied in part. Student clubs do meet during regularly scheduled school periods as part of the school day.

29. Admitted in part and denied in part. Student clubs do meet before and after class periods but during the school day and on school property.

30. Denied as stated. This averment is broad, ambiguous and vague and Defendants' response thereto may not coincide with the meaning attached by the Plaintiffs to the terms used in the averment. By way of further answer, all school clubs or organizations must be lawful, constitutional and deemed appropriate as school sponsored activities.

31. Denied as stated. The averment of this paragraph apparently refers to one or more oral, as opposed to written communications, which communications were made by unnamed individuals; furthermore, it is not known whether Plaintiffs intend this averment to be a quotation as to the request or requests made; for this and the above reasons, the averments of this paragraph are denied as stated.

32. Admitted in part and denied in part. It is admitted that the said Wayne E. Newton, Principal of the Williamsport Area High School and the said Oscar Knade, Superintendent of the Williamsport Area School District refused to recognize "Petros" as a sponsored school activity or organization. It is specifically denied that the said Defendants or any Defendant denied to the "Petros" group the opportunity to meet outside school hours and outside school property and facilities. The specific reason why the group known as "Petros" was denied this recognition and opportunity is that to permit same would be unlawful and unconstitutional and same was made known to the Defendants mentioned herein and to all of the Defendants by its solicitor and legal counsel.

33. Admitted. By way of further answer, reference is made to the January 2, 1982 letter of Lisa Bender, one of the Plaintiffs herein, to Richard F. Eberhart, one of the Defendants herein, which letter is attached hereto as Exhibit "A". By way of further answer, the request was denied for the reasons set forth in the letter of Richard F. Eberhart dated January 21, 1982, attached hereto as Exhibit "B".

34. This averment states a conclusion of law, to which no answer is required. Without waiving the foregoing, the Defendants state as follows: It is specifically denied that the denial by Defendants of Plaintiffs' request for recognition and permission to meet on the grounds of religious content of the proposed meetings violates the rights of Plaintiffs under the First Amendment of the Constitution of the United States, to exercise freedom of speech without regulation or restriction by the State imposed on the content of that speech. Specific proof to the contrary is demanded at trial.

COUNT II

35. Defendants incorporate by reference its answers to paragraph 1-34 above.

36. It is specifically denied that Defendants have discriminated based upon the content of speech or based upon any grounds whatsoever and it is further denied that Plaintiffs have suffered a violation of their civil rights under 42 U.S.C. Section 1983 or under any statutory or case law. Specific proof to the contrary is demanded at trial.

COUNT III

37. Defendants incorporate by reference its answers to paragraphs 1-36 above.

38. It is specifically denied that Defendants have conspired among themselves to perform the actions alleged in Plaintiffs' Complaint, including to violate the civil rights of the Plaintiffs. By way of further answer, any action or response made by the Defendants to the requests of Plaintiffs was proper, lawful and constitutional and could not, therefore, be the subject of a conspiracy. Specific proof to the contrary is demanded at trial.

COUNT IV

39. Defendants incorporate by reference its answers to paragraphs 1-38 above.

40. Defendants are without sufficient knowledge or information so as to form a belief as to the truth of this averment and it is therefore specifically denied and proof thereof is demanded at trial. Without waiving the foregoing, it is respectfully submitted that Plaintiffs' religious beliefs, as appropriate as they may be, do not give them the right to force the Defendants to sanction and authorize unlawful and unconstitutional use of school time and school facilities.

41. Denied as stated. For further answer, see paragraph 26 above.

42. This averment states a conclusion of law to which no answer is required. Without waiving the foregoing,

the Defendants state as follows: It is specifically denied that Defendants' actions in this case violate the rights of Plaintiffs to the free exercise of their religious beliefs under the First Amendment of the Constitution of the United States or that said actions constitute a failure to give reasonable accommodation to religious beliefs of the Plaintiffs. Plaintiffs may exercise whatever religious beliefs they choose, as guaranteed by the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania, but may not under existing law utilize the public school facilities herein to foster, sanction or officially recognize their religious beliefs and convictions. Specific proof to the contrary is demanded at trial.

COUNT V

43. Defendants incorporate by reference its answers to paragraphs 1-42 above.

44. This averment states a conclusion of law to which no answer is required. Without waiving the foregoing, the Defendants state as follows: It is specifically denied that the above alleged actions of the Defendants or any actions of the Defendants whatsoever violate the rights of the Plaintiffs to the equal protection of law under the Fourteenth Amendment of the Constitution of the United States. Specific proof to the contrary is demanded at trial.

COUNT VI

45. Defendants incorporate by reference its answers to paragraphs 1-44 above.

46. This averment states a conclusion of law to which no answer is required. Without waiving the foregoing, the Defendants state as follows: It is specifically denied that the above alleged actions of the Defendants or any actions of the Defendants whatsoever violate the prohibition of the Establishment Clause of the First Amendment of the Constitution of the United States against

state hostility against religion. Specific proof to the contrary is demanded at trial.

COUNT VII

47. Defendants incorporate by reference its answers to paragraphs 1-46 above.

48. This averment states a conclusion of law to which no answer is required. Without waiving the foregoing, the Defendants state as follows: It is specifically denied that the above alleged actions by Defendants or any actions by the Defendants whatsoever violate Article I, Sections 3 and 7 of the Constitution of the Commonwealth of Pennsylvania. Specific proof to the contrary is demanded at trial.

CLASS ACTION ALLEGATIONS

49. Defendants incorporate by reference its answers to paragraphs 1-48 above.

50. It is specifically denied that this suit is maintainable as a class action under the Federal Rules of Civil Procedure 23(a) and 23(b)(1) and (2). Specific proof to the contrary is demanded.

51. Defendant is without sufficient knowledge or information so as to form a belief as to the number of individuals who might belong to the "class" which Plaintiffs allege, and said averment is therefore specifically denied and proof thereof is demanded at trial.

52. Defendants are without sufficient knowledge or information so as to form a belief as to the number of individuals who might belong to the "class" which Plaintiffs allege, and said averment is therefore specifically denied and proof thereof is demanded at trial.

53. Specifically denied. Proof thereof is demanded.

54. It is specifically denied that the class consists of the members alleged by Plaintiffs and it is further spe-

cifically denied that said members, whatever their number, have in common the suggested questions of law and fact. Specific proof is demanded.

55. It is specifically denied that this class action is maintainable under Rule 23(b)(1) for the reasons set forth, or for any reason whatever. Specific proof is demanded.

56. It is specifically denied that the class action is maintainable under Rule 23(b)(2) for the reasons set forth or for any reason whatsoever. Specific proof is demanded.

57. This averment states a conclusion of law to which no answer is required.

WHEREFORE, Defendants pray your Honorable Court that Plaintiffs' claims for relief be denied, that their Complaint be dismissed for failure to state a cause of action and, further, that the Court find:

A. That the actions of Defendants denying recognition and permission for Plaintiff students to meet during school hours and on school property in the group "Petros" is not only consistent with the First and Fourteenth Amendments of the Constitution of the United States, but is required by same and further, is not contrary to Article I, Sections 3 and 7 of the Constitution of the Commonwealth of Pennsylvania, but is required by same.

B. That it will refuse to permanently or temporarily enjoin Defendants from denying Plaintiffs recognition and permission to function as a student club based on the religious content of their proposed meetings.

C. That it will refuse to issue a permanent injunction requiring the Defendants to allow the Plaintiffs to meet on the same terms as other student groups, with a faculty advisor to be present at the meetings solely for the purposes of procuring good order and not for any purpose related to the religious content of the meetings.

D. That it will refuse the Plaintiffs their costs therein and refuse the Plaintiffs' reasonable attorneys' fees pursuant to 42 U.S.C. Section 1988.

E. That it will indeed grant such other relief as in the interest of justice and equity may require.

WHEREFORE, Defendants demand that judgment be entered in their favor and against Plaintiffs, together with the costs and expenses of this action.

By way of further answer, the Defendants aver as follows:

FIRST AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a single claim or cause of action against the Defendants upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

The Court lacks jurisdiction over the claims alleged by Plaintiffs in their Complaint and further lacks both subject matter and in personam jurisdiction.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs are estopped from raising the claims alleged in their Complaint.

FOURTH AFFIRMATIVE DEFENSE

None of the Plaintiffs Federal or state Constitutional rights have been violated by the Defendants and, on the contrary, Defendants made the only decision with respect to the request of the Plaintiffs which could properly be made given the current case law and constitutional interpretations by the courts of the land.

FIFTH AFFIRMATIVE DEFENSE

Any action, decision or response made by the Defendants to the requests of Plaintiffs was proper, lawful and

constitutional and cannot, therefore, be the subject of a conspiracy.

SIXTH AFFIRMATIVE DEFENSE

The Defendants acted in good faith, with honest intention and exercised their best professional judgment based upon direct advice of the school district solicitor and legal counsel. Defendants are immune from liability under The Civil Rights Act, 42 U.S.C. Section 1983, et. seq.

SEVENTH AFFIRMATIVE DEFENSE

Defendant John C. Youngman, Jr. did not attend the school board meeting of January 18, 1982 and therefore did not vote or participate in the decision making process with respect to the question of recognition or nonrecognition of the group "Peters".

EIGHTH AFFIRMATIVE DEFENSE

The First Amendment of the United States Constitution provides in pertinent part that "Congress shall make no law affecting an established religion. . . ." The Establishment Clause and the case law interpreting same preclude use of school time and school facilities for the purposes requested by the Plaintiffs herein.

NINTH AFFIRMATIVE DEFENSE

The First Amendment to the United States Constitution insofar as it contains the guarantees of freedom of speech is not absolute, but is subject to the limitations imposed by the Establishment Clause of said Amendment.

TENTH AFFIRMATIVE DEFENSE

The First Amendment to the United States Constitution insofar as it contains the free exercise of religious clause is not absolute but is subject to the limitations imposed by the Establishment Clause.

ELEVENTH AFFIRMATIVE DEFENSE

There has been no denial of the Plaintiffs' equal protection under law in that all religious groups are equally denied access to and official recognition by public school facilities under the current constitutional law as promulgated by the courts of the land.

TWELFTH AFFIRMATIVE DEFENSE

Shortly after the Defendants received the request from the Plaintiffs to officially recognize as a school sponsored activity the group known as "Petros", said Defendants requested and received in writing an opinion from the school district solicitor and legal counsel that it would be unlawful, improper and unconstitutional to recognize said group as a student organization and that if said organization was so required, the Defendants, including the school district and the Board of Directors, would be susceptible to lawsuits brought against it and them by organizations, entities and individuals who would justifiably claim that the school district was acting in an unlawful, improper and unconstitutional manner.

THIRTEENTH AFFIRMATIVE DEFENSE

The purpose of the group "Petros" is religious and non-secular in nature; the effect of its recognition as a school sponsored organization would be to foster, advance or encourage religious activity; an additional effect of its recognition would be to create an unlawful and excessive entanglement between religion and the state, in violation of the Constitution and laws of the United States.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs Lisa Bender, Morris Braggs, Tony Robb, Robin Kriner, Kerri Hunter and Brenda Kay Herzog have all graduated from Williamsport Area High School,

are no longer students within the Williamsport Area School District and have no standing to maintain this action on their own behalf or on behalf of others.

FIFTEENTH AFFIRMATIVE DEFENSE

Recognition of the group "Petros" as an official school activity would have had the consequence of having the Williamsport Area School District impermissibly place its approval upon religious activities, all of which is precluded by the United States Constitution. This is true whether or not the group is nondenominational and whether or not it is voluntary.

WHEREFORE, the Defendants demand that judgment be entered in their favor and against Plaintiffs, together with the costs and expenses of this action.

Respectfully submitted,

By _____

NATHAN W. STUART, ESQUIRE
Counsel for Defendants
17 West Fourth Street
Williamsport, PA 17701
(717) 326-9118
McCORMICK, REEDER, NICHOLS,
SARNO, BAHL & KNECHT

By _____

DAVIL R. BAHL, ESQUIRE
Co-counsel for Defendants
835 West Fourth Street
Williamsport, PA 17701
(717) 326-5131

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

MOTION OF DEFENDANTS THE WILLIAMSPORT AREA SCHOOL DISTRICT, ET AL FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Rules of the Middle District, the Defendants Williamsport Area School District, et al, by their attorneys, hereby move your Honorable Court for summary judgment with respect to all causes of action alleged by all Plaintiffs against all Defendants.

Pursuant to Rule 401.4 of the Middle District, Defendants Williamsport Area School District, et al attach a statement of the facts material to this motion which they contend are not in dispute.

The facts and legal authority supporting this motion are fully set forth in the Affidavit of Oscar W. Knade, Jr., attached to this motion, in the pleadings previously filed herein and in the Brief in Support of Motion for Summary Judgment which is filed herewith.

Respectfully submitted,

By _____

NATHAN W. STUART, ESQUIRE
Counsel for Defendants
17 West Fourth Street
Williamsport, PA 17701
(717) 326-9118

MCCORMICK, REEDER, NICHOLS,
SARNO, BAHL & KNECHT

By /s/ David R. Bahl
DAVID R. BAHL, ESQUIRE
Co-counsel for Defendants
835 West Fourth Street
Williamsport, PA 17701
(717) 326-5131

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. On October 1, 1981, Morris R. Braggs, one of the Plaintiffs herein, addressed a letter to the Superintendent of the Williamsport Area School District. The content of that letter, which is attached as Exhibit One to the Affidavit of Oscar W. Knade, Jr., is a material fact not in dispute.

2. On October 2, 1981, Oscar W. Knade, Jr., one of the Defendants herein, addressed a letter to Morris R. Braggs. The content of that letter, which is attached as Exhibit Two to the Affidavit of Oscar W. Knade, Jr., is a material fact not in dispute.

3. On October 23, 1981, Morris R. Braggs and Lisa Bender, two of the Plaintiffs herein, addressed a letter and accompanying proposal to Oscar W. Knade, Jr., one of the Defendants herein. The content of that letter and proposal which are attached as Exhibit Three to the Affidavit of Oscar W. Knade, Jr., is a material fact not in dispute.

4. On January 2, 1982, Lisa Bender, one of the Plaintiffs herein, addressed a letter to Richard F. Eberhart, one of the Defendants herein. The content of that letter, which is attached as Exhibit Four to the Affidavit of Oscar W. Knade, Jr., is a material fact not in dispute.

5. On January 21, 1982, Richard F. Eberhart, one of the Defendants herein, addressed a letter to Lisa Bender,

one of the Plaintiffs herein. The content of that letter, which is attached as Exhibit Five to the Affidavit of Oscar W. Knade, Jr., is a material fact not in dispute.

Respectfully submitted,

By:

NATHAN W. STUART, ESQUIRE
Counsel for Defendants
17 West Fourth Street
Williamsport, PA 17701
(717) 326-9118

McCORMICK, REEDER, NICHOLS,
SARNO, BAHL & KNECHT

By:

DAVID R. BAHL, ESQUIRE
Co-counsel for Defendants
835 West Fourth Street
Williamsport, PA 17701
(717) 326-5131

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

COMMONWEALTH OF PENNSYLVANIA)
) ss
COUNTY OF LYCOMING)

AFFIDAVIT OF OSCAR W. KNADE, JR.

OSCAR W. KNADE, JR., being duly sworn according to law, deposes and says:

1. I am a defendant in the above action. I am familiar with the allegations made by Plaintiffs and with the facts pertaining to those allegations as set forth herein. The statements set forth in this Affidavit are based on my personal knowledge.

2. At all times relevant to the causes of action alleged in Plaintiffs' Complaint, I held the position of Superintendent of Schools in the Williamsport Area School District.

3. In September of 1981, representatives of the Plaintiffs, including Lisa Bender, met first with Wayne Newton, Principal of the Williamsport Area High School and later with Mr. Newton and with myself. During these meetings, the representatives asked for permission to form an organization to meet at school during school hours to read and conduct discussions on the Bible and to pray.

4. Attached hereto as Exhibit One is an October 1, 1981 letter of Morris R. Braggs, one of the Plaintiffs herein, signed by him and various other individuals. The letter requests, *inter alia*, the "establishment of a prayer meeting at W.A.H.S." which is described as a "Prayer Club", a "non-denominational group". The letter requests "some place in the school where we can meet and read some scriptures and pray to God that he might edify our minds."

5. Attached hereto as Exhibit Two is an October 21, 1981 letter from me to Plaintiff Braggs which is self-explanatory. The letter requests additional information and also questions the legality of the endorsement of such activities on school premises. Reference is made to an intention to seek a formal legal opinion. In the meantime, approval for meetings of the "Prayer Club" was withheld.

6. On or about October 21, 1981, I requested in writing of the school district solicitor that he offer me in writing his opinion concerning the legality of permitting such an activity and organization on school premises.

7. Attached hereto as Exhibit Three is an October 23, 1981 letter of Morris Braggs and Lisa Bender, two of the Plaintiffs herein, which has attached to it a document entitled "Proposal for a New Student Organization". The proposal provides that the organization will be a "non-denominational prayer fellowship", have as its purpose to "promote spiritual growth", will have regular meetings "on school premises during the Tuesday and Thursday morning activity periods" and will "include Scripture reading, discussion, prayer and other activities. . . ." It further proposes that "the organization will be supervised by a faculty advisor."

8. On or about October 30, 1981, I received the written opinion of the school district solicitor. Said opinion provided that the request in question must be denied because the activity proposed would violate the First Amendment to the United States Constitution if permitted by the school district.

9. On November 16, 1981, Mr. Newton and myself met at the Williamsport Area High School with six or seven representatives of the Plaintiffs' group, including Plaintiff herein, Lisa Bender. We reviewed with the students the solicitor's legal opinion and explained why the request must be denied. We then discussed an alternative where the Prayer Club would meet off school prop-

erty. We indicated that if the students secured a location and adult sponsor, preferably a clergyman, we would permit the students released time during school activity periods. The students said they would explore this suggested alternative.

10. Attached hereto as Exhibit Four is a January 2, 1982 letter of Lisa Bender, one of the Plaintiffs herein, to Richard F. Eberhart, who is President of the Williamsport Area School Board. The letter refers to the previous letter and proposal of October 23, 1981 (Exhibit Three hereto) and requests the proposal be placed before the School Board.

11. Attached hereto as Exhibit Five is a January 21, 1982 letter of Richard F. Eberhart. The letter is self-explanatory and sets forth the reasons for the Board's decision to affirm the previous decision of the Superintendent.

12. Plaintiffs Lisa Bender, Morris Braggs, Tony Robb, Robin Kriner, Kerri Hunter and Brenda Kay Herzog all graduated from the Williamsport Area High School on June 3, 1982 and are no longer students within the Williamsport Area School District.

Respectfully submitted,

/s/ Oscar W. Knade, Jr.
OSCAR W. KNADE, JR.

Sworn to and subscribed before me this 16th day of July, 1982.

/s/ John E. Wollett
JOHN E. WOLLETT
Notary Public
Williamsport, Lycoming Co., Pa.
My Commission Expires
August 27, 1983

513 Park Avenue
Williamsport, PA 17701
October 1, 1981

Superintendent
Williamsport Area School District
605 West Fourth Street
Williamsport, PA 17701

Dear Sir:

On behalf of the Prayer Club, I am writing you this letter concerning the establishment of a prayer meeting at Williamsport Area High School.

You must already know the situation and the atmosphere that has been outlined. We know how you feel to make a decision of this type, but we think you are missing the true concept of this prayer meeting. We are not forcing any student to attend these meetings. The meetings are for whom ever desire some need for personal and spiritual growth that they cannot get outside the school due to the availability or what ever the situation is.

This would be a non-denominational group, therefore we are not forcing any docterine [sic] on any student. It is open to any student.

What we want sir, is some place in the school where we can meet and read some scriptures and pray to God that he might edify our minds.

We feel that we are not asking too much, because we as students and American citizens have this basic right.

Sincerely,

/s/ Morris R. Braggs
MORRIS R. BRAGGS

WILLIAMSPORT AREA SCHOOL DISTRICT
605 West Fourth Street
Williamsport, Pennsylvania 17701
(717) 326-3501

October 21, 1981

Mr. Morris R. Braggs
513 Park Avenue
Williamsport, PA 17701

Dear Mr. Braggs:

This is in response to your letter of October 1, 1981, received in this office October 20, 1981, in which you request approval of "establishment of a prayer meeting at Williamsport Area High School."

When the question was first put to me, I asked Mr. Newton to secure from sponsors of the proposed club a detailed description of the activities of the club, including proposed meeting times and locations, likely membership, faculty sponsor and so forth. Until receiving your letter, this information was not available to Mr. Newton or me.

Your letter provides some information, but still lacks some important aspects of your proposed activity (faculty sponsorship, meeting times, likely membership). From the description in your letter of things your group proposes to do, it appears to me that you are proposing to conduct religious services, including prayer and scripture reading.

I believe it would be legally improper for a School District to approve or endorse such an activity on school district premises or on school time. Since I am not an attorney, I will ask the District's solicitor to provide his opinion on the matter at his earliest convenience.

Once I have competent legal advice as to the propriety of approving establishement of the proposed prayer club,

I will discuss it with you and your student colleagues at a mutually convenient time. In the meantime, I must withhold approval for meetings of the Prayer Club at school.

Sincerely,

/s/ Oscar W. Knade, Jr.
OSCAR W. KNADE, JR.
Superintendent

OWK/ms

WILLIAMSPORT AREA SCHOOL DISTRICT
605 West Fourth Street
Williamsport, Pennsylvania 17701
(717) 326-3501

October 21, 1981

Mr. Nathan W. Stuart
161 West Third Street
Williamsport, PA 17701

Dear Nate:

I am enclosing a copy of a letter from Morris Braggs, a student at Williamsport Area High School, requesting approval to establish a prayer group at the school. I have also enclosed a copy of my reply.

I would appreciate your providing me with a written opinion as to the legality of permitting such an activity at the school. All that I know about the group's proposed purposes is what Mr. Braggs describes in his letter. I hope that is sufficient information on which to base an opinion.

Sincerely,

/s/ Oscar
OSCAR W. KNADE
Superintendent

OWK/ms

Enclosures 2

Lisa Bender
R.D.2 Box 33
Linden, PA 17744

October 23, 1981

Dr. Oscar Knade
Williamsport School District
1401 Locust Street
Williamsport, PA 17701

Dear Dr. Knade:

We regret the recent misunderstandings concerning our desire to establish a new student organization at the Williamsport Area High School. Attached is a copy of our proposal for that organization. We would greatly appreciate your assistance in advising us of any further action that should be taken on our part in order that this proposal may be properly evaluated. Thank you.

Sincerely,

/s/ Morris R. Braggs
/s/ Lisa Bender
MORRIS BRAGGS
LISA BENDER

PROPOSAL FOR A NEW STUDENT ORGANIZATION

NAME OF THE ORGANIZATION

πετρα (The Rock)

NATURE OF THE ORGANIZATION

The organization will be a non-denominational prayer fellowship. Participation will be voluntary and open to all students.

PURPOSE OF THE ORGANIZATION

The purpose of the organization will be to promote spiritual growth and positive attitudes in the lives of its members

LEADERSHIP

Selection of leaders will be by democratic election. The leaders will be responsible for directing the meetings and coordinating activities in a manner that will carry out the purpose of the organization.

MEETINGS

Regular meetings of the organization will be held on school premises during the Tuesday and Thursday morning activity periods. They will include Scripture reading, discussion, prayer and other activities which may be of interest to the group.

SUPERVISION

Meetings of the organization will be supervised by a faculty advisor. Student attendance may be verified by the signing of a roster.

Lisa Bender
RD 2 Box 33
Linden, PA 17744

January 2, 1982

Richard F. Eberhart, Chairman
Williamsport School District
4101 Locust Street
Williamsport, PA 17701

Dear Sir:

Enclosed is a copy of a proposal for a new student organization at the Williamsport Area High School. This proposal was submitted to Dr. Oscar Knade on October 23, 1981. On the recommendation of Nathan Stewart, it was rejected. We are dissatisfied with this decision and are therefore requesting that the proposal be brought before the school board for an appeal. Please advise us, at the above address, of what action is being taken concerning this matter. Thank you.

Sincerely,

/s/ Lisa Bender
LISA BENDER

LCB:bjo
Enclosure.

WILLIAMSPORT AREA SCHOOL DISTRICT
605 West Fourth Street
Williamsport, Pennsylvania 17701
(717) 326-3501

January 21, 1982

Miss Lisa Bender
R.D. # 2, Box 33
Linden, Pennsylvania 17744

Dear Miss Bender:

On January 19, 1982, your letter of January 2 was presented to the School Board for discussion. The Board was briefed on the proposal for a student prayer fellowship organization at Williamsport Area High School. The Board was also told of the meeting your group had with Mr. Newton and Dr. Knade explaining why the District administrative staff could not approve the proposed organization.

Since your proposal involves issues concerning the legal concept of separation of church and state, the Board sought the advise [sic] of its solicitor on the matter. The solicitor informed the Board that the formal opinion he submitted to Dr. Knade was still valid and was, in fact, given confirmation by recent decisions of the U.S. Supreme Court. The solicitor advised the Board that to approve your proposal would be in violation of existing case law and therefore, an improper action. The Board decided, therefore, to deny your appeal.

Please be assured that neither the School Board nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not

permit public schools to authorize or support religious activities on school property.

Sincerely yours,

/s/ Richard F. Eberhart
RICHARD F. EBERHART,
President
Williamsport Area
School Board

RFE:w
cc. Dr. Knade
Mr. Newton
Mr. Stuart

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

MOTION OF PLAINTIFFS' LISA BENDER ET. AL. FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Rules of the Middle District, the Plaintiffs' Lisa Bender, et al., by their attorneys, hereby move your Honorable Court for summary judgment with respect to all causes of action alleged by all Plaintiffs against all Defendants.

Pursuant to Rule 401.4 of the Middle District, Plaintiffs Lisa Bender, et al. attach a statement of the facts material to this motion which they contend are not in dispute.

The facts and legal authority supporting this motion are fully set forth in the Affidavit of Morris Braggs and Lisa Bender, attached to this motion, in the pleadings previously filed herein in the transcript of Depositions of Mr. Newton and Dr. Knade, and in the Brief in Support of Motion for Summary Judgment which is filed herewith.

Respectfully Submitted,

WILLIAMS AND SEEVERS

By: /s/ Gerald W. Seevers
GERALD W. SEEVERS
Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. In early September, 1981, representatives of the Plaintiffs, including Lisa Bender, Morris Braggs, and Kerri Hunter, met with Wayne Newton, Principal of the Williamsport Area School District and requested permission to begin meeting with other students.

2. Mr. Newton granted the students permission to meet during the first regularly scheduled activity period following the discussion. At the first meeting, approximately 45 students attended to read scripture and pray.

3. After their first initial meeting, the students were informed by Mr. Newton that he would have to discuss their club with the Superintendent of Williamsport Area Schools.

4. On October 1, 1981, Morris Braggs, with signatures of most of the other 44 students, sent a letter to the Superintendent addressing their desire to form a voluntary non-denominational group for "personal and spiritual growth".

5. On October 21, 1981, Oscar W. Knade, Jr., Superintendent of the Williamsport Area School's, sent a response to Morris Braggs in which he informed the students that he personally "believed that it would be legally improper for the School District to approve or endorse this activity on school premises or on school time". He also informed them that he "would seek the opinion of the School District Solicitor".

6. On October 23, 1981, Morris Braggs and Lisa Bender, on behalf of themselves and other interested students, sent another letter to Dr. Knade, in which they

enclosed a copy of their proposal for their voluntary organization.

7. On November 16, 1981, Mr. Newton and Dr. Knade met with representatives of the Plaintiffs' group at the Williamsport Area High School, at which time they advised the students that their request to form the club was denied because the speech and activity in which they desired to engage was religious in content. . .

8. On January 2, 1982, Lisa Bender, on behalf of herself and the other students, including the Plaintiffs herein, sent a letter to Richard F. Eberhart, Chairman of the Williamsport Area School Board appealing the decision of the superintendent of schools and requesting the School Board to approve their new club.

9. At their regularly scheduled meeting on January 19, 1982, the School Board affirmed the action of the Superintendent and denied the appeal of the students desiring to form this group.

10. On January 21, 1982, Richard F. Eberhart, President of the Williamsport Area School Board formally notified Lisa Bender and the other students by letter that they were affirming the decision of Mr. Newton and Dr. Knade in denying the students' appeal.

11. All of the Plaintiffs were students of the Williamsport Area School District at the time of these actions including the date of the filing of the Complaint.

WILLIAMS AND SEEVERS

By: /s/ Gerald W. Seevers
GERALD W. SEEVERS, ESQUIRE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

STATE OF MICHIGAN)
) ss
COUNTY OF)

AFFIDAVIT OF LISA BENDER

LISA BENDER, being duly sworn according to law, deposes and says:

1. I am a plaintiff in the above action. I am familiar with the allegations and the facts pertaining to those allegations as set forth herein. The statements set forth in this affidavit are based on my personal knowledge.

2. At all times relevant to the alleged causes of action, I was a student in the Williamsport Area School District.

3. In September, 1981, myself and other plaintiffs met with Mr. Wayne Newton, Principal of the Williamsport Area School District. At this meeting, we requested permission to form a club to hold meetings during the regularly scheduled activity period, at which time there would be prayer and Bible reading. Mr. Newton told us to go ahead and meet because other students had done so in previous years and he did not believe that there would be any problems. He did, however, inform us that we could not advertise our meetings either by announcing or by posting announcements on bulletin boards.

4. On the following Tuesday, approximately 45 students were in attendance and we met in the school cafeteria at which time a passage of scripture was read and students who wished, prayed. At this meeting a teacher, functioning as a monitor, was present, but did not in any way participate in the activity.

5. On the next Thursday, these same students returned to the cafeteria for our second meeting. However, we were informed by Morris Braggs that Mr. Newton had informed him earlier in the morning that because of the number of students, he would have to obtain approval from the School Administration. Until such time, we were not to have any further meetings.

6. On October 1, 1981, Morris Braggs, with signatures of most of the 44 other students, sent a letter to the superintendent of the Williamsport Area School District requesting his permission to meet as a voluntary non-denominational group for the purpose of "personal and spiritual growth". See Exhibit 1, attached hereto and made a part hereof.

7. On October 21, 1981, Morris Braggs received a letter from Dr. Oscar W. Knade, Jr., Superintendent of the Williamsport Area School District advising us that he personally believed "that it would be legally improper for the School District to approve or endorse such an activity on School District premises or on school time". He advised us that he was seeking a legal opinion from the School District Solicitor. See Exhibit 2, attached hereto and made a part hereof. Morris Braggs and myself sent an additional letter to the Superintendent, with a formal proposal setting forth the name, nature, purpose, and organization of our proposed student organization. See Exhibit 3, attached hereto and made a part hereof.

8. On November 16, 1981, representatives of the group, including most of the Plaintiffs herein, met with Mr. Newton the school principal, and Dr. Knade, the Superintendent, at which time we were advised that our request must be denied because the speech and the activities were religious in content.

9. On January 2, 1982, I, sent a letter to Richard F. Eberhart, President of the Williamsport Area School Board, appealing the decision of the Superintendent of

Schools, and requesting the School Board grant permission for the new club to meet. See Exhibit 4, attached hereto and made a part hereof.

10. On January 21, 1982, I received a letter from Robert F. Eberhart, President of the Williamsport Area School Board, in which he informed us that the School Board had affirmed the decision of the Superintendent of Schools and that our appeal was denied. See Exhibit 5, attached hereto, and made a part hereof.

Respectfully Submitted,

/s/ Lisa Bender
LISA BENDER

Sworn to and subscribed
before me this 30
day of August, 1982.

/s/ Connie A. Brisboe
CONNIE A. BRISBOE
Notary Public

Superintendent
Williamsport Area School District
605 West Fourth Street
Williamsport, PA 17701

Dear Sir:

On behalf of the Prayer Club, I am writing you this letter concerning the establishment of a prayer meeting at Williamsport Area High School.

You must already know the situation and the atmosphere that has been outlined. We know how you feel to make a decision of this type, but we think you are missing the true concept of this prayer meeting. We are not forcing any student to attend these meetings. The meetings are for whom ever desire some need for personal and spiritual growth that they cannot get outside the school due to the availability or what ever the situation is.

This would be a non-denominational group, therefore we are not forcing any docterine on any student. It is open to any student.

What we want sir, is some place in the school where we can meet and read some scriptures and pray to God that he might edify our minds.

We feel that we are not asking too much, because we as students and American citizens have this basic right.

Sincerely,

/s/ Morris R. Braggs
MORRIS R. BRAGGS

WILLIAMSPORT AREA SCHOOL DISTRICT
605 West Fourth Avenue
Williamsport, Pennsylvania 17701
(717) 326-3501

October 21, 1981

Mr. Morris R. Braggs
513 Park Avenue
Williamsport, PA 17701

Dear Mr. Braggs:

This is in response to your letter of October 1, 1981, received in this office October 20, 1981, in which you request approval of "establishment of a prayer meeting at Williamsport Area High School."

When the question was first put to me, I asked Mr. Newton to secure from sponsors of the proposed club a detailed description of the activities of the club, including proposed meeting times and locations, likely membership, faculty sponsor and so forth. Until receiving your letter, this information was not available to Mr. Newton or me.

Your letter provides some information, but still lacks some important aspects of your proposed activity (faculty sponsorship, meeting times, likely membership). From the description in your letter of things your group proposes to do, it appears to me that you are proposing to conduct religious services, including prayer and scripture reading.

I believe it would be legally improper for a School District to approve or endorse such an activity on school district premises or on school time. Since I am not an attorney, I will ask the District's solicitor to provide his opinion on the matter at his earliest convenience.

Once I have competent legal advice as to the propriety of approving establishment of the proposed prayer club,

I will discuss it with you and your student colleagues at a mutually convenient time. In the meantime, I must withhold approval for meetings of the Prayer Club at school.

Sincerely,

/s/ Oscar Knade
OSCAR W. KNADE, JR.
Superintendent

WILLIAMSPORT AREA SCHOOL DISTRICT
605 West Fourth Street
Williamsport, Pennsylvania 17701
(717) 326-3501

October 21, 1981

Mr. Nathan W. Stuart
161 West Third Street
Williamsport, PA 17701

Dear Nate:

I am enclosing a copy of a letter from Morris Braggs, a student at Williamsport Area High School, requesting approval to establish a prayer group at the school. I have also enclosed a copy of my reply.

I would appreciate your providing me with a written opinion as to the legality of permitting such an activity at the school. All that I know about the group's proposed purposes is what Mr. Braggs describes in his letter. I hope that is sufficient information on which to base an opinion.

Sincerely,

/s/ Oscar
OSCAR W. KNADE
Superintendent

OWK/ms

Enclosures 2

Lisa Bender
R.D. 2 Box 33
Linden, PA 17744

October 23, 1981

Dr. Oscar Knade
Williamsport School District
1401 Locust Street
Williamsport, PA 17701

Dear Dr. Knade:

We regret the recent misunderstandings concerning our desire to establish a new student organization at the Williamsport Area High School. Attached is a copy of our proposal for that organization. We would greatly appreciate your assistance in advising us of any further action that should be taken on our part in order that this proposal may be properly evaluated. Thank you.

Sincerely,

/s/ Morris R. Braggs
/s/ Lisa Bender
MORRIS BRAGGS
LISA BENDER

Lisa Bender
RD 2 Box 33
Linden, PA 17744

January 2, 1982

Richard F. Eberhart, Chairman
Williamsport School District
4101 Locust Street
Williamsport, PA 17701

Dear Sir:

Enclosed is a copy of a proposal for a new student organization at the Williamsport Area High School. This proposal was submitted to Dr. Oscar Knade on October 23, 1981. On the recommendation of Nathan Stewart, it was rejected. We are dissatisfied with this decision and are therefore requesting that the proposal be brought before the school board for an appeal. Please advise us, at the above address, of what action is being taken concerning this matter. Thank you.

Sincerely,

/s/ Lisa Bender
LISA BENDER

LAB:bjo
Enclosure.

[See pages 48 & 49 for reproduction of letter attached as Exhibit 5]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

DEPOSITION OF WAYNE A. NEWTON AND OSCAR KNADE

[2]

Taken by: Plaintiffs

Before: SHELLY L. HAMPTON, Reporter Notary Public

Date: August 24, 1982, 9:30 A.M.

Place: WILLIAMS and SEEVERS, 57 East Fourth Street, Williamsport, Pa. 17701

Appearances:

WILLIAMS AND SEEVERS

By: GERALD W. SEEVERS, ESQUIRE
For—Plaintiffs

MCCORMICK, REEDER, NICHOLS, SARNO, BAHL & KNECT

By: DAVID R. BAHL, ESQUIRE
For—Defendants

LAW FIRM OF NATHAN W. STUART, ESQUIRE

By: NATHAN W. STUART, ESQUIRE
For—Defendants

[3] STIPULATION

It is hereby stipulated by and between counsel for the respective parties that reading, signing, sealing, certification and filing are waived; and that all objections except as to the form of the question are reserved to the time of trial.

WAYNE A. NEWTON, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SEEVERS:

Q Mr. Newton, my name is Gerald Seevers and I'm the attorney for the students. I'm going to ask you a series of question, at least 80 of them, I have them all written out. I would just say, if you do not understand any of my questions, I will be glad to rephrase them. I will assume that if you do not ask me to rephrase them that you understand and I will consider your answer accordingly.

Will you state your full name, please?

A Wayne Newton.

Q What is your occupation?

A Principal of the Williamsport Area High School.

Q How long have you been principal?

A Since 1974.

Q How many students are in Williamsport Area High School?

A This coming year approximately 2480.

[4] Q How many teachers are in the high school?

A 157.

Q Do you have teaching aides beyond that number?

A We have in the neighborhood of about eight aides working in various areas of the building.

Q From what areas do the students come to the high school, what political subdivisions?

A The Williamsport School District consists of the City of Williamsport, as far west as Woodward Township and as far north as Lewis Township or Bedines, Trout Run, Hepburnville, that area.

Q What is the policy of the Williamsport School District regarding student clubs and student meetings on public school grounds?

A Policy has be that any group of students that wishes a meeting within the confines of the building must meet with a faculty advisor. They must have the activity approved by the administration and they are permitted to meet during the activities period if it's a group of people that are approved by the school.

Q Is this policy written in formal?

A I can't honestly answer that. This is a policy that was passed on to me by the former principal verbally.

Q Do you know under what circumstances that policy is formulated?

[5] A It was formulated before I came to Williamsport.

Q How much discretion does the policy give the school principal to grant or deny access to school facilities for student clubs?

MR. BAHL.: Could you clarify that question, discretion with respect to what? Are you saying whether there is a variance in one of those three requirements that you mentioned?

BY MR. SEEVERS:

Q Do you have the right or is it your discretion, do you have the right as a principal to make this determination?

MR. BAHL: I have to object to that question. Could you please clarify that, I'm not sure I understand what your question is. I'm not objecting to the area, but I'm objecting to the specificity of the question.

BY MR. SEEVERS:

Q You gave me the policy, is that correct?

A Yes.

Q And my question is whether, do you have to go to the superintendent to make that decision when a group or a teacher or somebody comes to you requesting the formation of a club, do you have to go to the superintendent or to the school board or can you make that decision?

A I can make that decision, but I would only make it if I were sure in my own mind that what I was doing was legal and proper as far as the rules and regulations of the school district. [6] If I had a question, I would seek the advice of Dr. Knade and also the school solicitor.

Q Previous to this particular incident or request, have you ever discussed this policy with Dr. Knade?

A I haven't really discussed policy, I discussed other organizations that wish to form.

Q. What sort of student clubs, I mean students of Williamsport Area High School proper, choose to participate?

A Can you be more specific on that question?

Q What kind of clubs are there existing or was there existing in the 1981-82 school year at the high school?

A You have your student government organization, the Future Homemakers of America club, there is a Spanish club, we have different organizations such as the student government, the different publications organizations that meet during activities period, I can't give you a verbatim list of all of them.

Q Is there a Key Club?

A Yes.

Q There is a group Peer Helpers?

A Yes.

Q Are there any political clubs such as the Young Democrats or Young Republicans, something of that nature?

A No.

Q Was there during that school year?

A No.

[7] Q Has there been in the past?

A Not to my knowledge.

Q What about any kind of philosophy clubs?

A Not that I can recall in the years that I've been principal.

Q Are students limited to participation in the existing clubs?

A What do you mean limited, they can't participate in something we wouldn't have.

Q May students initiate new clubs?

A They may initiate new clubs upon requesting approval, yes.

Q Have students initiated new clubs in the past?

A Yes.

Q Could you tell me what the purposes of the existing clubs meeting at the high school might be?

MR. BAHL: Objection to the question. You're asking for the purposes of all the existing clubs or one of them?

BY MR. SEEVERS:

Q Do you know what the purpose of the Key Club is?

A The Key Club is an organization which we feel is there to perform services to the school and to the community. For example, in this past year, they conducted a run-a-thon for the benefit of the Brown Library and collected approximately $1200 to that end. They perform different services for the school [8] serving as ushers for open houses, or ushers for ninth grade orientation. It's also connected with the local Kiwanis Club which is a service organization to the community of Williamsport, it is sponsored by them in fact.

Q Can you tell me what the purpose of the Peer Helpers Club is?

A The Peer Helpers, as I understand it, is a group of students trained by one of our guidance counselors to help other students that are having difficulties with home and school, either personal problems or problems with school work. They serve in the capacity of writing a weekly article for the newspaper, whereupon they answer questions and give advice, so to speak, to students that write in.

Q They not only help students academically, they help them socially?

A That is one of their goals, yes.

Q The existing clubs, is attendance to all these clubs voluntary in nature at this time?

A Yes.

Q If I understand what you're saying, the students can choose to be in any one of these clubs?

A Yes.

Q Tell me, why has the Williamsport School District decided to allow student clubs to meet on a general basis?

A I don't understand your question.

[9] Q What's the reason for permitting clubs to exist within the framework of the high school?

A I personally feel that the students in any high school, in order to have, to receive a well-rounded education, have to have social contacts as well as academic and I think they have to learn how to grow socially, the same as they do academically, and I think this is accomplished in the many activities at the high school.

Q When and where are student clubs allowed to meet?

A Student clubs can meet during the regular activities period which is Tuesday and Thursday of each school week, it runs for a period of 30 minutes. If they so desire, some of them have met after school, depending upon when they wanted to have the meeting. For example, the Key Club has meetings both during the school day and after school at night.

Q Do any of those clubs meet before school?

A Not as a formal group, they may—for example, the Key Club, many of the officers of the Key Club are in one home room and they see each other and they may conduct business before the school day begins, I don't know.

Q Would they be permitted, would any of the existing clubs be permitted to meet before school if they just requested permission to do so, would you grant that permission?

A Yes, sir.

Q You said the activities period is on Tuesday and Thurs- [10] day. Is the time relatively the same every year?

A Usually, I don't have the time schedule before me. The opening school activities usually take about the first 15 minutes and it's right around 7:57 we move into the activities period and it runs to 8:27.

Q The activities period on Tuesdays and Thursdays is the first period, it's not an academic first period——

A Right.

Q ——but, the first period of the day?

A Right.

Q What do students do who do not go to the clubs in the activities period?

A Many students use this as a study period in which they can do homework. Many students work in the library, it gives them the chance to research in the library or take care of other activities of the school, taking pictures for the yearbook, working on the things of that nature. Many of the coaches sometimes meet with the athletic students during this period. I view it as a time during the day in which students can take care of all extra-curricular activities. When they have to meet with somebody, some of them go to another teacher for help, many things that can be done, chorus rehearsals.

Q When does your school day begin and end?

A 7:45 'til 2:20.

Q When does class instruction begin?

[12] A 7:57 they move to the first period, normally.

Q And on Tuesdays and Thursdays they would go to an activity period?

A Yes.

Q How do the students get to and from the Williamsport Area High School?

A By bus.

Q Must they ride on the bus or are they permitted to have some other means of transportation?

A They can ride the bus, their parents can bring them to school, if they so desire, there are some that walk, that are living rather close to the school, and by special permission students may drive if they have a reason for that.

Q Would you say that the vast majority of your students ride buses?

A Yes.

Q How many buses service the school?

A Approximately 40.

Q Is there a late bus?

A Yes, sir.

Q When does it leave the school ground?

A Depending upon the time of year and the activities that are being conducted after school, we run a fall, winter and a spring late bus. The schedule, for example, in the fall, the first bus arrives at approximately 4:15. There's another bus at [12] 5:30 and another bus at 6:30 for the late run.

Q How many buses are engaged in this, say, at 4:30, how many buses would come to the school and pick up students?

A Usually two.

Q Would this be a like number at 5:30 and 6:30?

A Depending, if it's, there are times when it takes four buses for the late runs.

Q Depending on the football schedule?

A Depending on whatever activities there are. This year, we have right at the present time, we have tennis, soccer and football activities in the athletics after school as well as cross country, so probably there would be four buses running to begin the year with until we see what the ridership is.

Q Are students allowed to be inside the school building before and/or after school?

A Yes.

Q On what terms?

A Before school activities or before school, myself and three house principals and many teachers are there as early as 7:15. Normally, if a student group meets after school, the policy is that they must meet with somebody on the faculty, there must be a faculty member present.

Q Would you or a faculty member be required to be with students in the school before school?

MR. BAHL: Are you asking that question as if a student [13] group was meeting before school?

BY MR. SEEVERS:

Q If there were a group of students who came to the school, whether they were in a club or not, if they came into the school, are they required to be under the direct supervision of either a principal or a faculty member?

A If the students are meeting as a club, such as the Key Club, their advisor would be required to meet with them. If they are not meeting as a club group, or are just in the building, we have principals and teacher monitors starting at, the teacher monitors are on duty at approximately 7:30 every morning. Very seldom do we have students in the building before that time.

Q Teacher monitors are?

A Hall monitors.

Q Just hall monitors?

A Yes.

Q Where is the high school located?

A It's located at the western end of the City of Williamsport. About 98 percent of it is in the City of Williamsport and 2 percent is in old Lycoming Township.

Q How many acres does the campus consist of?

A 147.

Q The school is not located within the city proper such as, well, like Jackson, even like Roosevelt Middle School?

A The building itself is entirely within the city limits [14] of Williamsport.

Q How close is it to the nearest private residence?

A Going by way of the road?

Q Yes.

A Approximately a mile, that's a mile from the building.

Q Right. Have student groups ever been allowed to meet without formal recognition?

A Not to my knowledge.

Q At least not while you've been the principal?

A No, sir.

Q Do you have assemblies at the high school?

A Yes, sir.

Q When are they held?

A They're normally held during the regular activities period on Tuesday and Thursday unless it's a special assembly and then on those days we would go to an activity day schedule.

Q Are these required assemblies or are they voluntary?

A Voluntary with the exception of the beginning of the year when we have the orientation assemblies, we do require, for example, next week we will require all ninth graders to be in the auditorium and meet, more or less like a welcoming and then on subsequent days we will meet with each of the grade levels, 10, 11 and 12.

Q Where do the students who do not wish to attend the assemblies go, where do they remain?

[15] A They can treat it as a normal activities period, they can stay in the room, we also permit other activities to meet at the same time that we have voluntary assemblies. For example, we can have a voluntary assembly and a student government meeting the same day, or a Key Club meeting the same day. If it's an assembly where, for example, an entire room wants to go or a teacher wants to go, that teacher goes with them for supervision. Those who do not wish to go can go to another room and be under the supervision of another teacher.

Q The teachers that are in the assemblies, they're basically just there to monitor the conduct of the students?

A In many cases the teachers wish to see what is in the assembly, also.

Q Are they or are they not on formal duty?
A Non-homeroom teachers are on formal duty.
Q Non-homeroom teachers?
A Yes.
Q What outside speakers have been allowed to come in to the high school to speak?
MR. BAHL: Can you put a time limit on that question?

BY MR. SEEVERS:

Q Say during the last three years, can you recall what kind of speakers you've had?
A We had a speaker from, I can't think of the name of the nuclear society, what's the name of the center, down in [16] Kentucky or Tennessee?
MR. BAHL: You lost me.
A The Atomic Center, its people came around and talk energy to the students. In other words, all different forms of energy, nuclear energy, sun energy. We've had speakers come in, most of the speakers we've had have been in the science and nature with the exception of normal regular school activities where they meet with students like the various meetings with the salesmen from the Jostens Company to order forms for graduation.
Q Never had any political science speakers?
A In the assembly program?
Q Yes.
A Not that I can recall. I think the political speakers are taken care of in large group instruction sessions during the regular class period with social studies, American cultures, world cultures, speakers such as Alan Ertel.
Q Do you have a list of speakers who would have been in the last three years?
A I don't have such a list, no.
Q You don't maintain a list of speakers that would have been in there?

A Not a formal list, I have a record of who was there in the last three years somewhere in my correspondence, I'm sure. We have speakers that are made available to us from Lycoming College, professors who have come in and speak on different [17] occasions, usually within the small group discussions.

Q Could you supply me with a list of speakers who have been in the high school during the past three years?

MR. BAHL: Off the record.

(Discussion held off the record.)

MR. BAHL: We have had an off the record discussion during which I have expressed my concern that in order to respond affirmatively to the request that it would be necessary for the principal or other personnel at the school district to go through every piece of correspondence that has been written and sent out of the school district in the last three years. If that is true, we would consider the request to be burdensome, especially at this time of the year. I will, however, ask Mr. Newton if he will see if he can readily come up with a list of speakers that have been at the school in the last three years without having to go through all of the correspondence and insofar as he is able to do that, we will comply with the request. I don't know whether that satisfies you or not, Jerry.

MR. SEEVERS: That's fine. I don't have any objection to that at the present time.

BY MR. SEEVERS:

Q Mr. Newton, are you aware of a group of students that sought permission to form a student group called Petros?

A Yes, sir.

Q Could you tell me when your first contact was with [18] these students?

A I can't give you the exact date. I can tell you that it was at the beginning of the 1981-82 school year during

the month of September and a group of students approached me and asked for permission to start such a group which was not known to me by that name at that time.

Q Who were the students who met with you?

A Lisa Bender, Morris Braggs and there was one other girl there on the first meeting, I believe it was—

Q Kerri Hunter?

A Yes, I think those are the three people that first approached me on the first meeting.

Q Could you tell me what the request was?

A Their original request was not very clear to me. Originally, they were saying that they wanted to meet as a group of students and my question to them was for what purpose and they more or less left me with the belief that they had to meet as a group before they could give me their purpose. I did permit, more or less, an organizational-type meeting for these students to meet so they could tell me what they were going to do. When they made known to me what they were going to do, at that point I had to, in my opinion, say no at that point because of the literature I have read with regard to prior [sic-prayer?] type groups meeting on school time.

Q What did they say the purpose was going to be?

[19] A I would say the purpose is the same as is outlined in the brief that Nate Stuart has filed with somebody, maybe you can help me on that. In the brief here it more or less said that they wanted to meet as a Bible reading and prayer-type group.

Q Your understanding is they wanted to meet for religious purposes?

A Yes.

Q And you decided to deny them permission to meet, is that correct?

A I denied permission for them to meet until such time as I could get further advice from Dr. Knade and from the school district solicitor.

Q Would they have been allowed to meet before or after school?

MR. BAHL: I'm sorry, would you clarify that. He just said they were denied permission to meet pending a review by the superintendent and the solicitor.

BY MR. SEEVERS:

Q They requested to meet during the activities period, did they not?

A Yes.

Q My question to you, would you have denied them permission to meet had they requested to meet before or after school?

A If they had been requesting to meet for the same purpose, I would have denied it, yes.

[20] Q Are there any conditions under which they could have been granted permission to meet?

A That's a rather difficult question to answer until I know what any group that is going to meet, I ask them to state what the purpose of the meeting is for and what they wish to accomplish and without having that, I can't say yes they can or no they can't.

Q What I understand you're saying is, your denial was on the basis that they were going to engage in religious speech, is that correct?

A Yes.

Q Have you ever denied student club status to any other posed student club besides the Petros group?

A You're asking have I denied them permanent or temporary denial?

Q Well, have you denied any temporarily?

A Until at such time as I found out what the purpose of the organizations were.

Q After you found out the purpose, have you denied any complete denial of any other group?

A Not that I can recall.

Q Are you aware that prior to your denial to the Petros group, that students had been meeting in the high school for religious speech?

A Not strictly for that purpose, no, sir.

[21] Q What do you mean by that?

A I was aware of the fact that when you have 2400 students, approximately, in a building, that before school groups of students do meet periodically throughout different parts of the building and I don't think that we are there to restrict those kinds of activities before school, I wouldn't say—

Q Are you aware—

MR. BAHL: Excuse me, he had not finished his answer.

A I was not aware that students were meeting as a formal group for that particular purpose, no, sir.

BY MR. SEEVERS:

Q You were not aware that there were students meeting during the activities period prior to that time who were engaging in religious speech?

A No, sir.

Q Have you ever had any complaints from other students about students voluntarily meeting for religious activities?

A No, sir.

Q Do you or your administration, do you actively screen the speech of other permitted student clubs or groups to make sure you think it's proper?

MR. BAHL: Could you clarify that question, screen the speech of other groups, that is so broad and vague that I think any response to it would have to of necessity also be very broad and vague.

[22] BY MR. SEEVERS:

Q Do you make, you and the other principals or supervisors, actively check, attend, periodically, student groups to make sure that the speech which is going on is what you consider proper?

A I would say that the very rule that we have with regard to any group must meet with a faculty advisor gives us direct input as to what is going on. We ob-

viously cannot check 15 class meetings or 15 different meetings every time they meet.

Q Do you screen or your administration screen speakers to clubs or regular classes?

MR. BAHL: I have to object to the use of the word screen. I don't know what it means in the context of your question and I'll have to object on the basis that I think it should be clarified as to whether he inquires as to the speech before the speech or after the speech, I think the question has to be more specific to be understandable.

BY MR. SEEVERS:

Q Do you require your teachers or club supervisors to present to you or one of the other principals or supervisors, the name of the speaker before that club or class?

A Before the class meets?

Q Yes.

A Yes.

Q Have you ever had occasion to deny permission for an individual to speak before a club or class?

[23] A Yes.

Q Could you tell me on what basis, if you can remember?

A Some years ago we had a request come to us for a man to come and speak on the subject of transcendental meditation.

Q Is that before a club or an assembly or class?

A That was before, he wanted to speak before an assembly group, a voluntary assembly group.

Q Was that brought through him or students or faculty members?

A It was brought to me through a faculty member originally.

Q This would be a normal procedure for you, for the teacher or supervisor to be required to go through the administration for approval of their speakers?

A Yes, sir.

Q Tell me, what was the purpose of the Williamsport School District policy for allowing student clubs to meet on school grounds?

A I think this is a repeat of the question that was asked before, am I correct?

MR. BAHL: I think it is.

MR. STUART: Absolutely.

A As I said before, the purpose of having clubs meet in the school are to teach students how to grow socially as well as academically.

[24] BY MR. SEEVERS:

Q Would you say or do you believe that if Williamsport School District decided to allow religious clubs, such as Petros, to meet on school facilities, that these religious clubs would dominate the school campus?

MR. BAHL: Would you define the word dominate, please, and until such time as you do, I would object to the question.

BY MR. SEEVERS:

Q Control.

MR. BAHL: I have to object to that word, what do you mean by control the school campus?

BY MR. SEEVERS:

Q The fact that they would impose upon, would be of such influence that they would impose upon other students the necessity for their religious beliefs?

MR. BAHL: Your question, then, is whether Mr. Newton believes if he were to permit a group such as Petros to meet, that the effects of that would be to permit or to cause those groups to dominate, control or somehow affect the rest of the activities on the campus?

MR. STUART: Would the word proselyte work?

MR. BAHL: Is my summarization of the question accurate?

MR. SEEVERS: Yes.

MR. BAHL: Can you answer that question?

A I think the question, first of all, is asking me to [25] answer something which has been interpreted to me as being illegal, as far as the interpretation I received from our school superintendent and solicitor.

BY MR. SEEVERS:

Q I'm asking you in your professional opinion whether you think that granting permission to that one group would eventually lead to the domination of these types of groups?

MR. BAHL: I'm going to pose one other objection to that, Jerry, that is the question and the answer to that question is totally irrelevant to the reasons why the denial was made. That is not within the scope of the defenses raised to our complaint. It's not within the scope of the motion for summary judgment or the brief and support thereof. It's also not within the scope of the statement of material facts or affidavit that supports that. I think it is totally and completely irrelevant.

MR. SEEVERS: It's totally irrelevant in relationship to what case law has said.

MR. BAHL: I'm glad you agree with that and I'm glad that's on the record.

MR. SEEVERS: Not to what you said, but my question is relevant based upon what case law has said.

MR. BAHL: I'm sorry, we fail to see that relevancy at all.

MR. SEEVERS: The courts see the relevancy.

MR. BAHL: Where?

[26] BY MR. SEEVERS:

Q You're saying that you cannot answer that question or will not at your attorney's instructions, I'm assuming?

MR. BAHL: I have not directed him not to answer that question because in some way, shape or form it

potentially could be relevant, but I fail to see that relevancy. My objection to the question moreover is that it causes him to speculate as to what his views might have been if he had considered that particular topic, and I think his testimony is that he did not consider that particular topic.

BY MR. SEEVERS:

Q Does the high school give standardized aptitude tests?

A Yes, sir.

Q Can you tell me what they are?

A We have one which has the acronym of a Snap test which is—

DR. KNADE: School Needs Assessment Profile.

A —School Needs Assessment Profile. We also participate in—

BY MR. SEEVERS:

Q Is that Snap, is that totally academic?

A Yes, sir. We participate in one with the state which measures not only the academic, but other things such as student needs and student desires, I can't think of the name off the top of my head, it's EQA, Educational Quality Assessment.

[27] Q How do Williamsport Area High School students rank or score in relationship to other students around the country?

A What measures—did you want me to—

Q Academically?

A If we're referring to college board scores, the Williamsport School District or Williamsport High School is ranked above the national average, above the Middle States' average and above the state average, in math and English scores.

Q In your professional opinion, again, how would you rate the intelligence of the average high school students?

A I think the best I can answer that is I personally

feel that the student body of the Williamsport High School is above average with regard to what I hear going on around the country in like size high schools.

Q Do you give any tests which would measure the maturity level of your students?

A Well, the Snap test that I referred to—could you repeat the question, again?

Q Outside of just academic, math, science, verbal skills, do you have any tests or any that you mentioned or any other tests, do they measure the maturity level of the student?

A I think the Educational Quality Assessment as given by the state does that.

Q Once again, how would the average student in the high school rank overall?

[28] A The last testing that we gave, I have not seen the scores on yet, so it would be rather difficult to answer about the present student body that we have right now. We just took the test last year and the results are due in anytime, but from the last testing that we had, we fared pretty well, I was pretty happy with our students.

Q In general, above average?

A Yes.

Q Do you think, since you're been principal, have you been giving this test since you've been principal?

A I think the first time we gave it was approximately four years ago, when the state started this process.

Q Has the maturity level of the students increased during that time or do you remember?

A Well, I have to have a reference to refer to. In other words, as I said, we've given the first series and we've gone through the second one, but I don't have the results on that yet, I have to have some point of where you're starting at. I personally feel that it has.

Q Do you believe that if you were to make an announcement over the P.A. system that a Petros group was being allowed to meet on school grounds on an equal

basis with other student groups, both religious and non-religious equally, do you believe that your average student could understand that this was not being a school-sponsored club based upon that announcement?

[29] MR. BAHL: I'm going to pose the following objections to that question: Number 1, it's irrelevant. Number 2, it's highly speculative. Number 3, the question does not deal with the reasons why the group Petros was denied official school status. Number 4, I think the question is vague and unclear. Subject to all of these objections, you may answer the question if you are able to do so.

A Would you repeat the question, please?

BY MR. SEEVERS:

Q Do you believe that if you, as the principal, were to get on the P.A. system and make an announcement that the Petros group was going to be permitted to meet as a club along with other school clubs, such as the Key Club, et cetera, on an equal basis, do you believe that the average student in the high school would be able to discern the fact that this was not, that the school was not sponsoring a religious club?

MR. BAHL: I think the question is contradictory in and of itself. If you get on the P.A. system that a club is going to meet on school property during school time on an equal basis with all of school clubs, then in effect the school is sanctioning and authorizing the use of its facilities so, there is no discerning of the fact to be made.

MR. SEEVERS: Are you answering the questions for him?

MR. BAHL: I'm objecting on the basis it is contradictory in and of itself.

[30] MR. SEEVERS: You've already objected on four different grounds.

MR. BAHL: I'll object under as many grounds as are proper, Jerry. The question, I don't think, is an understandable one and I think there is a basic contradic-

tion in it so it can not be answered. I will direct my client not answer that question.

BY MR. SEEVERS:

Q What sort of adult supervision does the school district generally require of student groups, you might have answered that before, but I don't remember.

A Any group of student that meets within the confines of the school district meets with an advisor, a paid coach or somebody of that nature, somebody that is on the faculty or somebody that is being hired by the Williamsport Area School District to perform the function.

Q Students' parents or other adults would not be permitted to supervise groups?

A No, sir, I didn't say that student parents—

Q I know you didn't say that, I'm asking you a question.

A Can student parents—

Q Yes.

A If it's made known to the administration and they receive permission, then they are meeting within the rules and regulations of the school district.

[31] Q I'm assuming that this is done on occasion with reference to band parents or something like that?

A Yes, sir.

Q Generally speaking, do adult supervisors participate in the student group meetings or activities?

A I would say yes. If they're an advisor, I would expect them to be there as somebody who's going to help the students.

Q Are there any student clubs for which the faculty advisor is instructed not to participate?

A Not to my knowledge.

Q Do you have any activities or clubs where the adult is, what I term, a room monitor, like your hall monitors, might be there for control as opposed to participation?

A I do not look upon advisors as hall monitors, I think they're there to help the activities.

Q But, you don't have any presently like that situation?

A Not that I know of, unless it's a group of students that meets on their own in the hallway before school, that would not be something I would know about. It's hard to discern what is a group when you have 2400 students under one roof.

Q At the time of your denial of the group to meet, did you have reason to believe that the Petros group either planned to disrupt school educational activities or would do so unintentionally?

[32] A No, sir.

Q You said you did not know of any religious groups that were meeting in the past, is that correct?

A Can you explain what you mean by religious groups?

Q Similar to the Petros groups.

A No, sir.

Q Do you know the students who were in the Petros group?

A I know several of them personally, yes.

Q How would you describe the conduct of these students that you know in the Petros group?

A Excellent.

Q Do you have any reason to believe that the students seeking to form the Petros group were insincere in their religious convictions?

A No, sir.

Q How much do you know about the religious beliefs of the students in the Petros group?

A The only thing that I can know about it is what they have expressed to me.

Q Did they express to you that it would be students from one particular denomination?

A No, sir.

Q Did they tell you it would be an inter-denominational group?

A Yes, sir.

[33] Q You stated you denied these students permission to meet as a club. Would you have taken disciplinary action against the students if they chose to meet for religious discussion on school ground during the time requested without permission?

MR. BAHL: I object to the question on the basis it's speculative and irrelevant.

A It's difficult for me to answer on something that hasn't happened. Each school day is full of surprises.

BY MR. SEEVERS:

Q That would be in violation of school policy, is that correct?

A Yes, sir.

Q And I'm assuming if they're in violation of the school rules, you would discipline them?

A Let me answer it in this manner. Any activity that's held within the school district is under the control of principals and teachers, students being excused for homeroom to go to these activities must state where they are going. In other words, during the school day, by school law, every student is under the control of the principal and some teacher, that's state law and that's what we must abide by.

Q If they violate that rule, then they would be subject to disciplinary action?

A I would say so.

Q You didn't deny the students seeking to form a Petros [34] group permission because of personal problems with any group members, did you?

A No, sir.

Q Did you or did you not deny the Petros group the same privileges granted to other student groups because of the religious nature of the group's speech?

A That question is not clear to me, would you rephrase it or state it again?

Q Did you or did you not deny the Petros group the same privileges granted to other student groups because of their religious nature of the group's speech?

A What are you referring to when you say group's speech?

Q Because of the nature of the religious speech of the group?

MR BAHL: He's asking for a clarification of the question and you just used the same word, could you put it in somewhat of a different order?

BY MR. SEEVERS:

Q Did you deny permission of the Petros group to meet strictly because their speech was religious in nature?

MR. BAHL: Same objection. The witness would like you to clarify what you mean by nature of the group's speech, the religious nature of the group's speech and you're using the same words and just applying them in a different order.

MR. SEEVERS: It's either religious or non-religious [35] speech, it's either religious or secular.

MR. BAHL: The witness does not understand the question and I think we started this deposition that if he did not understand the question that you ask, you would rephrase it.

BY MR. SEEVERS:

Q Did you arrive at your decision to deny the student group access to school facilities independent of the decision of other school officials?

A My original decision to deny this group to meet was based upon any knowledge of what is permitted under law.

Q But, initially you did not contact Dr. Knade or the school board, right?

A My first answer to them was that I did not think that would be permitted, that it would not be legal to do, so I would check further to make sure.

Q When you made your final decision, to what degree did you rely on the judgment of others, particularly other school officials, Dr. Knade, the school board?

A The original decision?

Q Your final decision.

A Final decision was based upon the advice from Dr. Knade and the school solicitor.

Q Were you in agreement with that final decision?

MR. BAHL: Objection, you can answer the question. Objection to the relevancy of the question, you can answer the [36] question if you can.

A I think the best way I can answer the question is to state, if I am to perform the duties as outlined to me by the school board, I am obligated to go according to the decision of the policy-making group.

BY MR. SEEVERS:

Q Has the school curriculum ever included a course on religion?

A We presently have a course in the curriculum called Western Religions.

Q Was that being taught last year?

A No, sir, there were insufficient students requests for the course to offer it. It was offered initially, but did not have enough students wishing to take the course.

Q Is it meeting this year, do you have enough students this year?

A No, sir, it's called Literature of Western Religions.

Q Can you tell me the last time it was taught?

A About two years ago.

Q Can you tell me what the purpose of that course was?

A The Literature of Western Religion presents reading from literature of Judaism, Christian and Islam, students discuss the significance of religious literature in

universal terms and in relation to their own experiences in an objective manner.

Q How would you distinguish the teaching of that course [37] from a club desiring to meet for discussion or practice of religious speech?

MR. BAHL: Objection to the relevancy of the question. Again, it doesn't matter how he would distinguish those two, what matters is whether or not it is permitted in the school activity to take place during the school hours and on school grounds is or is not constitutional. Subject to that objection you can answer the question, if you are able to do so.

A The difference, as I view it, is that the course in Literature of Western Religions is a discussion of different writings of the different religions. As I understood it, the request made by the Petros group was for the purpose of prayer and for personal gain that they would receive from doing so.

MR. SEEVERS: I have no other questions.

MR. BAHL: I'd like to take a five minute recess and discuss this with Mr. Stuart. Pending our discussion, the witness would not be released.

MR. SEEVERS: Fine.

[38] OSCAR KNADE, called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SEEVERS:

Q Dr. Knade, I'm Gerald Seevers, attorney for the students. I'm going to be asking you a series of questions. If you do not understand any of the questions, please advise me and I will try to rephrase them. If you do not request them to be rephrased, I will assume that you understand the question and answered accordingly.

This shouldn't take us as long as Mr. Newton's but I am going to ask you some of the same questions.

Could you give us your name, please?

A Oscar W. Knade, Jr.

Q What is your occupation?

A Superintendent of the Williamsport Area School District.

Q How long have you been superintendent, sir?

A 10 years.

Q Would you tell me what the policy of the Williamsport School District regarding student clubs and student meeting on the public school grounds is?

A The school district has no specific policy with respect to student clubs except that responsibility for their supervision is delegated to the principal in [39] the respective schools.

Q There is not a formal—

A Specific policy governing clubs, that's correct.

Q I guess you weren't here when I asked Mr. Newton, but he said that the policy with which he was acquainted was given to him or passed down to him by the former principal, would that be your understanding?

A It might have been. Coming from, probably, the handbook, the Faculty and Student Handbook for the Williamsport Area High School which is published for years and years.

Q There is a Faculty Handbook as well as a Student Handbook?

A Yes, sir.

Q Could I acquire a copy of that?

A The most recent copy you could acquire is some years ago. It has not been reprinted for more than three years. A new printing is in the process for distribution this year.

MR. BAHL: Are you making a request for that?

MR. SEEVERS: I would request one that would have been in effect last year, the 1981-82 school year.

MR. BAHL: One of the old vintage?

MR. SEEVERS: Yes.

[40] A It would have to be one of the old-timers and there's a folder which the students got, too, that has the

regulations on it, so you'll have to ask that to be supplied as well.

BY MR. SEEVERS:

Q Are you acquainted with the policy, the policy Mr. Newton had at the high school?

A No, I can't say that I'm acquainted with it. I'm not sure what you're referring to by policy.

Q The policy in regards to the meeting of student clubs. You said that there wasn't any formal written policy and in essence it was at the discretion of the principal.

A Of the principal, yes.

Q Had you discussed, prior to this particular incident, had you discussed the policy of student clubs with Mr. Newton?

A No.

Q Are you familiar with the student clubs which presently exist at the high school?

A To a reasonable extent and by name.

Q You don't have any active involvement in the approving them or anything of that nature?

A That's true, I do not.

Q Could you tell me why the Williamsport School [41] District decided or permits student clubs to meet on a general basis?

A In addition to providing an academic environment, the school district also attempts to provide opportunities to explore certain interests which may have general value to themselves and to the community, service clubs, service organizations or organization is built around a specific academic interest, such as language club, German club, for example.

Q This is—could you characterize the purpose of being to help them to grow, not only academically but socially, emotionally, things of that nature?

A Certainly.

Q Is the access to school facilities, is that left to the discretion of the principal?

A Not entirely.

Q Would you have any say so or control as to whether students would be permitted to use school facilities before or after the school day?

A Depends on the purpose.

Q Could you tell me under what circumstances you would expect Mr. Newton or any school principal to contact you in regards to a school club?

A Uh-huh. Yes, any time a request for the use of school facilities cannot be responded to with clear [42] guidance written in the school board policy, that is something that appears to fall outside of policy, there has not been a practice that has gone unchallenged, say, for a period of time, and I'm thinking primarily of things that happened within the school that are, perhaps, no organized nature, like to get a group together to see if we can form a group of 200 students to participate in the float refining of the Susquehannock, could we have an organizational meeting, we can't allow that, that's not covered in the policy. The policy, though, happens to control access by outside groups, non-school related groups and school related groups and sets for a series of fees for the use of facilities and conditions under which facilities might be used and certain rules.

Q You say that there wasn't any written school policy in regard to student clubs, is that correct?

A Uh-huh, in school board policy.

Q Does that mean that the school principal would have to clear all new student clubs with you?

A No. He would not have to, but he might consult with me about it. It might be a budgetary implication, there might be a question of the possibility of teachers' association or union desiring to have the advisor paid a stipend which would have to be negotiated, for reasons such as those, he might have to consult with [43] me whether such an establishment is advisable or permissible.

Q Can you tell me what—are you aware of a group of students who sought permission to form a student group called Petros?

A I am.

Q Could you tell me what your first contact was with these students.?

A As I recollect, my first contact was a conversation with Wayne Newton about the request he received by the group to form an organization with, apparently, faculty sponsorship and permission to meet during student activity periods twice a week. My response to him was that he, before he allows the group to form, he should secure a written description from the proposed organization precisely what the group would do and what it expected of the school.

Q Did you personally meet with any of these students?

A Yes.

Q Can you tell me what the students related to you as to their purpose?

A Their purpose was related to me previously in the form of a written proposal. I met with them in November in order to discuss with them why their proposal [44] could not be approved.

Q Their proposal was to meet as a student group to engage in religious speech, is that correct?

A I would imagine so, if religious speech means prayer, testimony.

Q Those were the things that they told you specifically they were going to do?

A Those are the things that were written in the proposal.

Q Did you decide to deny access to the Petros group to school facilities?

A Upon the advice of legal counsel, I decided to deny.

Q Can you tell me on what basis this denial took, what was the basis of the denial?

A You mean my communicating it?

Q As to your understanding of your solicitor.

A My understanding of the reasons for the denial is that the request, if implemented and approved, would have constituted a violation of the first amendment of the United States Constitutions interpreted by the supreme court, federal district court and district court in a variety of jurisdictions, or federal circuit court, I should say.

Q These students wanted to meet during an activity [45] period, is that correct?

A That's correct.

Q Would you have denied them also had they desired to meet before or after school?

A I would have if the request had been to meet on school premises.

Q Was there any conditions under which they could have met on school premises under the conditions as such?

MR. BAHL: I object to the question as speculative and does not have proper foundation. You can answer the question.

A No.

BY MR. SEEVERS:

Q To your knowledge, have you personally ever denied a student group status to any other proposed student group?

A I cannot think of any.

Q Are you aware that prior to your denial of the Petros group, that students had been meeting in the high school for religious speech?

A No.

Q In reference to speakers who come to the classes or assemblies, do you have any active part in saying they may or may not speak or is that left solely for the dis- [46] cretion of the principal?

A It's not specific, although I have been consulted about requests to bring in resource people, would this

be permissible, would it work, for an occasional drop in.

Q Can you give me any specific instances where a speaker would have been denied permission to speak?

A While I didn't handle this directly, I think Mr. Newton's answer about someone wanting to make a speech about transcendental meditation was denied, we did consult about it and decided transcendental meditation was a religious expression.

Q That was also denied because of the speech was to be religious in nature?

A It was solely and purely a request, as I recall it, to present a religious speech.

Q You're familiar with the high school testing program, are you not?

A I am.

Q Would you concur with Mr. Newton's opinion that Williamsport High School, the average Williamsport High School student ranks higher, basically, academically?

A Academically I would agree.

Q Than other student. Would you agree with the assessment that, I think, their maturity level would be [47] higher?

A I could not generalize as he did. There are a number of tests that are given in the school district for a number of years which show a wide range of maturity on different issues and attitudes.

Q Could you tell me what test they might be?

A That's the educational quality assessment test administered by the Pennsylvania Board of Education and measures both academic and attitudinal status of students. The test is related to the 12 goals of quality education in the state board of education and some of those goals have to do with things such as developing positive self image, appreciating the work of others and so forth and so on that they're bound to be attitudinal measures insofar as the paper and pen test can do that.

Q You attend all the school board meetings, I assume?

A Yes.

Q Outside of the ones where you might be out of town.

A Yes.

Q Do you take an active part in the discussions?

A Yes.

Q Outside of the fact you do not have a vote.

[48] A That's correct.

Q Can you tell me when the proposal of the Petros groups was considered by the school board?

A It was in January, probably be the third week in January, whatever date that was. It's probably on my affidavit.

Q To the best of your recollection, was there a formal vote taken at that time?

A There was none taken.

Q Can I conclude that the final decision to deny access to the Petros group, that was made by yourself?

A No. The Petros group received a letter from the president of the school board indicating the board's position that affirmed earlier actions of the administrations that could not permit the group to be organized and acted on school premises.

Q There was not a formal vote affirming that, correct?

A That's true, there was none. There didn't need to be any. Let me put it a different way. No one on the board moved to change the course of action, there was neither a mover or a seconder.

Q I'm assuming Mr. Eberhart was just instructed to address the letter to the students?

A The sense of the board is pretty well obvious [49] to most the people around the table and the solicitor's opinion hadn't changed any since advising me in October or so and that there was no reason to change the decision.

Q Do you know of any—are there any school board policies or regulations requiring adult supervision of student clubs or student groups?

A It doesn't need to be, it's covered fairly adequately in state law. Student groups must be supervised by a professional employee of the commonwealth.

Q You were here when Mr. Newton answered that question, were you not?

A No, what did he say?

Q Mr. Newton, I do believe, said that there were occasions in which students' parents or other adults supervised the student groups.

A That's true in athletics.

MR. BAHL: I have to object to that question on the basis that Mr. Newton's response dealt with a particular activity of a group, be it an event, weekly meeting where there would be an adult supervisor who would have been a parent. I do not believe he indicated there is a student group that functioned solely and exclusively with a student parent and not with any faculty representative.

BY MR. SEEVERS:

[50] Q Have you ever had any complaints about students meeting on a voluntary basis at the high school for religious activities?

A No.

Q You said you met personally with some of the students of the Petros group. Had you ever met them previous to that time?

A Not really. I knew one of the students by reputation, the other I did not, had not known previously.

Q I assume that would be Morris Braggs?

A That's correct.

Q Did you have any reason to believe that the students seeking to form the Petros group were insincere in their religious convictions?

A I have no such reason.

Q Since you denied them to meet, would you have expected there to have been disciplinary action taken against these students had they decided to meet for their

religious discussions when they had been denied, if they met on school grounds?

A Are you telling me that they did meet or speculating that they might have met?

Q I'm speculating. Would you expect disciplinary action to be taken, this is one—

A I'm not sure I want to speculate about that [51] either.

MR. BAHL: I'll phrase the same objection to the question of this witness that I did when you asked it of Mr. Newton.

BY MR. SEEVERS:

Q I think you answered this, but you arrived at your decision to deny them access to school facilities because of their speech was religious based upon the solicitor's opinion, is that correct?

A Their purpose was religious and the solicitor's opinion indicated that such purpose could not be accommodated in the school.

Q You stated that in the January meeting of the board there was general agreement to abide by the solicitor's opinion?

A That is correct.

Q Do you have any reason to believe that the Petros group either planned to disrupt the school educational activities or would do so unintentionally?

A I have no reason to believe that they planned, I will not speculate whether they might have or not.

MR. SEEVERS: That's all the questions I have.

CROSS-EXAMINATION

BY MR. BAHL:

[52] Q Based upon objective academic testing, are there students at the Williamsport High School that rank higher than national average?

A Yes.

Q Based upon that same objective ranking, are there students at the Williamsport High School who rank below the national average?

A Yes.

Q Would there also be students ranking above and below the state average?

A That is true.

Q With respect to the concept of maturity; whatever that means, and with respect to objective measurements of that, for example, we talked about the portions of the E.Q.A., are there students at the Williamsport High School that would be ranked more mature than the national average?

A On specific measures, there would be some ranked at a higher level of expectancy and others would be ranked at a lower level.

Q So, there are students that fall on both sides of normal?

A Always.

Q I think it's necessary to clarify for the reader of this deposition the decision of the school [53] board in January of 1982. You have indicated that no formal vote was taken. Could you testify as to whether or not anyone made a motion to that previous decision of the superintendent of schools be rejected or changed?

A No one made such a motion.

Q What was the result of the failure of anyone to make such a motion?

A Previous action stood.

Q Was that indeed the position of the school board as you understood it, that the previous action stood?

A Yes, because the request to the school board by Lisa Bender, et al was on appeal from my decision and by not taking any action one way or another, the appeal was denied.

Q Dr. Knade, exhibit five to your affidavit which is attached to this motion for summary judgment is a January 21, 1982 letter of Richard F. Eberhart, presi-

dent of the school board. Is that the letter previously referred addressed to Lisa Bender?

A It is.

MR. BAHL: No further questions.

(Whereupon, the deposition was concluded at 11:28 A.M.)

[54] CERTIFIED QUESTIONS

The following questions were not answered by the deponent upon advice of counsel:

1. Page 28, Lines 20 through 25.

/s/ Shelly L. Hampton
SHELLY L. HAMPTON
Reporter—Notary Public

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WITNESSES

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

ORDER

[Filed Nov. 9, 1982]

The Background of this Order is as follows:

Presently pending before the court are cross-motions for summary judgment. At the present time, the record is incomplete as to the exact nature of the activity period, the type of activities or clubs that have been, and would be, approved, and what proposed groups, if any, have been denied approval. Accordingly, the court shall order the parties to submit affidavits or other documentation addressing these points within fifteen (15) days of the date of this Order.

NOW, this 9th day of November 1982, it is hereby ordered that the parties shall submit affidavits or other documentation within fifteen (15) days of the date of this Order addressing the questions identified in this Order and any other information deemed appropriate.

/s/ William J. Nealon
Chief Judge
Middle District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

AFFIDAVIT OF WAYNE E. NEWTON

COMMONWEALTH OF PENNSYLVANIA)
) ss
COUNTY OF LYCOMING)

WAYNE A. NEWTON, being duly sworn according to law, deposes and says that he is and has been Principal of the Williamsport Area High School and that the facts as set forth below are true and correct to the best of his knowledge, information and belief:

I. EXACT NATURE OF ACTIVITY PERIOD

The "activities period" is a regularly scheduled time during the school day which occurs between 7:57 a.m. and 8:27 a.m., usually on Tuesdays and Thursdays of each week. Depending upon the need for same, any day of the week can and has been designated as an "activities day".

Attached hereto, made a part hereof and marked Exhibit A is a Williamsport Area High School "Bell Schedule" which shows the time periods during a regular day and an activities day. On a regular day, the first class period begins at 7:57 a.m.

Each school day officially commences at 7:45 a.m. when all students must be in their homerooms, at which point attendance is taken. School District supervision of each student occurs as soon as that student reaches the high school building, which is before 7:45 a.m. each day.

If a student does not attend one of the club meetings or activities, he or she is obligated to remain in home-

room or study in the library until the next class period begins. In addition to the activities and clubs below mentioned, the activities period is utilized to allow students to visit the school's computer station to take practice sample questions in preparation for college entrance examinations and to orient students to various careers and vocational opportunities by sessions entitled "Careers Galore".

II. TYPES OF ACTIVITIES OR CLUBS THAT HAVE BEEN AND WOULD BE APPROVED.

Activities and clubs which promote the intellectual, physical and social development of students have been approved as officially sanctioned student activities, permitted to meet during the school day, i.e. the activities period, permitted to use school facilities and with a faculty advisor or monitor assigned to it. The current student activities so sponsored by the School District are:

Student Government

Key Club

Class Organizations (student class officers and executive board)

Library

Business English Club

Future Homemakers of America

Vo-Tech Club

Speech and Drama Club

Ecology Club

The Cherry & White (student literary art magazine)

Billtown Banner (student newspaper)

La Memoire (student yearbook)

Band (concert and marching bands)

Choir

Among the activities and clubs which have existed in the past and which could be renewed if student interest warrants are: Archery, Art, Audubon, Aviation, Chemistry, Chess, Field, Forest and Stream, Future Nurses and Future Teacher clubs. Others include the Bowling, German, Poetry, Photography and Ski clubs.

Any student activity or club which is considered to contribute to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper would likely be approved as an officially sponsored and sanctioned school activity. There is no formal mechanism or procedure for applying for school sponsored or sanctioned status, other than by oral and possibly written request as was followed by the students wishing to have "Petros" recognized as an official school activity.

III. PROPOSED GROUPS WHICH HAVE BEEN DENIED APPROVAL

To the best of my recollection, no other proposed student group or activity has been considered constitutionally improper and/or has been denied official school sponsorship.

/s/ Wayne E. Newton
WAYNE E. NEWTON
Principal

Sworn to and subscribed before me this 23rd day of November, 1982.

/s/ Mary H. Bower
MARY H. BOWER
Notary Public
Williamsport, Lycoming Co., Pa.
My Commission Expires Oct. 17, 1983

WILLIAMSPORT AREA HIGH SCHOOL

BELL SCHEDULE

REGULAR DAY		ACTIVITIES DAY
7:45	Homeroom Convenes	7:45
7:48	Attendance Deadline	7.48
7:53	Homeroom Period Ends	7:53
	Activities Period Begins	7:57
	Activities Period Ends	8:27
7:57	First Period Begins	8:31
8:43	First Period Ends	9:12
8:47	Second Period Begins	9:16
9:33	Second Period Ends	9:57
9:37	Third Period Begins	10:01
10:23	Third Period Ends	10:42
10:27	Fourth Period Begins	10:46
11:13	Fourth Period Ends	11:27
11:19	Fifth Period Begins	11:33
11:20	First Lunch Begins—Section I	11:34
11:24	First Lunch Begins—Section II	11:38
11:50	First Lunch Ends—Return to Class	12:05
11:54	Class Begins	12:09
12:05	Second Lunch Begins—Section I	12:14
12:09	Second Lunch Begins—Section II	12:18
12:40	Second Lunch Ends—Fifth Period Ends	12:50
12:44	Sixth Period Begins	12:54
1:30	Sixth Period Ends	1:35
1:34	Seventh Period Begins	1:39
2:20	Seventh Period Ends (Dismissal)	2:20

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF LYCOMING)

GERALD W. SEEVERS, being duly sworn according to law, deposes and says, that he is the attorney of record for the plaintiffs, that on August 24, 1982, he took the oral depositions of Defendants, Wayne A. Newton, principal of the Williamsport Area High School, and Defendant, Oscar Knade, Superintendent of the Williamsport Area School District, that the original deposition has been filed with this Honorable Court and that the following is a true and accurate summary of portions of the depositions relevant to the Order issued by this Court on November 9, 1982;

A. TESTIMONY CONCERNING SCHOOL POLICY ON STUDENT CLUBS

1. With regard to official school policy on student activity clubs, Dr. Knade testified, that "(T)he school district has no specific policy with respect to student clubs except that responsibility for their supervision is delegated to the principal in the respective schools" (Knade; p. 38, l 22 to p. 39 l 1.).

2. Mr. Newton testified that the policy which he followed was passed on to him verbally by his predecessor. (Newton: p. 4, ll 21-23).

B. TESTIMONY CONCERNING NATURE OF ACTIVITY PERIOD

3. Regarding the nature of the activity period and the purpose of student clubs in the Williamsport Area School District. Dr. Knade testified that, "(I)n addition to providing an academic environment, the school district also attempts to provide opportunities to explore certain

interests which may have general value to themselves and to the community service clubs, service organizations, or organization (sic) is built around a specific academic interest, such as language clubs, German club, for example." (Knade: p. 41, ll 3-9). Dr. Knade also agreed that the purpose of clubs was to help students grow socially and emotionally, as well as academically. (Knade: p. 41 ll 10-13).

4. Mr. Newton also indicated that the purpose of school clubs is to enable students to "grow socially" thereby helping them "to receive a well-rounded education". (Newton: p. 9, ll 1-8). According to Mr. Newton, the activity period is viewed by him, "as a time during the day in which students can take care of all extracurricular activities." (Newton: p. 10 ll 18-20). Those students who do not want to participate in club activities during the period use the time for a host of diverse activities, including studying in their homerooms, working in the library, taking pictures for the yearbook or meeting with athletic coaches. (Newton: p. 10 ll 11-22).

C. A LIST OF APPROVED ACTIVITIES AND CLUBS AT WILLIAMSPORT AREA HIGH SCHOOL

5. The clubs and activities approved by the school which have meetings during the activity period include:

Key Club
Peer Helpers Club
Future Homemakers Club
Newspaper
Yearbook
Spanish Club
Vocational Technical Club
Business English Club
Student Government Association
Cheerleaders
Stage Crew
Audio-Visual Aides

Office Aides
Lab Assistants
Color Guard
Three (3) Bands
Orchestra
Three (3) Choirs
Speech and Drama Club
Sports Teams

(Source, Williamsport Area High School LaMemoire Yearbook for 1980-81 and 1981-82, relevant sections are attached hereto, made a part hereof and marked Exhibit "A").

D. NO OTHER CLUBS DENIED PERMISSION TO MEET

6. Dr. Knade testified that during his ten years as Superintendent of Williamsport Area School District, he was not aware of any club other than Plaintiffs that have been denied the opportunity to meet. (Knade: p. 45 ll 15-18).

7. Likewise, Mr. Newton testified that in his eight years as principal of the Williamsport Area High School, no group other than Plaintiffs (Petros), has been denied permission to meet. (Newton: p. 20 ll 12-21).

/s/ Gerald W. Seevers
GERALD W. SEEVERS
Counsel for Plaintiffs

Sworn to and subscribed
to before me this 22nd
day of November, 1982.

/s/ Linda J. Bowman
LINDA J. BOWMAN
Notary Public
Williamsport, Lycoming County

My Commission Expires August 11, 1986

Member, Pennsylvania Association of Notaries

[Certificate of Service Omitted in Printing]

MUSICIANS

MILLIONAIRE CONCERT AND MARCHING BANDS

The 1980-81 Marching Millionaires and Millionaire Concert Band both had a very good performance season. The Marching Band completed a very successful year with a fifth place at State Finals. This was the first year that the band competed in the highest and most difficult division of Cavalcade, the "Yankee" class.

At "Black Diamond Cavalcade" in Shamokin, the band took the Grand Prize, and it took second place at the "Pageantry in Motion" at Ephrata. High marching scores and high music scores, along with second place, were awarded to the Millionaires at "Bands on the Warpath." The band cleaned up at the Loyalsock Tournament of Bands Show, when it took first place overall, first place in Division IV, Best Marching and Maneuvering, Best Music, and Best Band Front. With the work of preparing for all these competitions, the band members weekends were pretty much taken up. Their fall and summer weeknights were devoted to practice, but looking back on all their victories and awards, the practice was well worth their effort. This year, the band was lead by Drum Major, Keith Kuzio, and Field Captains Chris Straka and Mike Helminiak. Under the direction of these three students, band director Paul Kellerman, and with the help of many other dedicated people, the band was able to find great satisfaction in winning, and in learning to work together in such a large group.

The Millionaire Concert Band also had an extremely active and successful season. SomSome of its activities included: the Winter Pops Concert, the Spring Concert, and the concert at Knoebel's Amusement Park. The band also sponsored the Millionaire Music Festival that took

place at the high school and concluded downtown with a huge parade, on May 30 and 31. One of the band's proudest achievements was the earning of a Superior rating on Grade VI Music at the PMEA State Adjudication Festival, a portion of the Millionaire Music Festival. This is the highest rating possible on some of the hardest music written.

As a whole, both portions of the Millionaire Band enjoyed many successful performances and tasted victory many times.

STAGE BAND

The 1980-81 edition of the W.A.H.S. stage band had a very successful year; it was full of talent and no less than three of its senior members will be going on to major in music—David Shover, Roger Williams, and Brent Robinson. The stage band, under the direction of Donald Griffith, was made up of select members of the brass and percussion sections of the Millionaire Concert Band. The members had to audition in order to be selected for the group. The group performed at the "Pops" concert in January, at the Spring concert in April, and at Knobles Grove in May. One of the band's best "audience grabbers" this year was the Herb Albert hit, "Rise," which featured a trumpet solo by Roger Williams. Other soloists included Dave Shover on cornet and Burr Harrison on tenor saxophone. Next year, more appearances and more applause!

COLORGUARD AND WINTER GUARD

Members of the Millionaire Indoor Colorguard have a deserved reputation for being excellent performers. The Guard demonstrated this by receiving the highest score ever earned by any unit in the Harrisburg Indoor Drill Association in regular competition—a stunning 93.3!! In

addition, their reputation for good sportsmanship and friendliness is as great, and for most members, being friendly is as important as winning trophies. When asked what being a "winner" means, guard member Chrissy Casson replied, "It doesn't simply mean taking home a trophy. Winning means knowing that the entire group is doing its best and entertaining the crowd." While the guard was at the H.I.D.A. finals, they received a standing ovation before they even performed, showing that they are highly respected not only for their quality performances, but for their quality personalities. The W.A.H.S. Colorguard's reputation precedes it performances!

This year the guard performed at a home basketball game, a pep rally, an activity period assembly, a Mansfield State College basketball game, a lecture demonstration for music education majors at Mansfield and at an exhibition for the Bi-State Colorguard Circuit. In their six competitions, they placed first four times, and took second place twice. They placed second in the H.I.D.A. finals.

Even though being in the guard takes a lot of hard work and time, the members find it worthwhile because the guard teaches them "self-discipline and respect for others."

Symbolically, many guard members cited their favorite moments as those times at competitions when they are "standing hand in hand waiting for the judges announce the scores." Unity in action! It continues to typify indoor Colorguard excellence!

SENIOR CHOIR

The Senior Concert Choir, under the direction of Mr. Thomas Gallup, has been recognized as one of the most outstanding choirs in the state. The highly accomplished choir performed a total of ten times throughout the 1980-

81 school year, with concerts consisting of both sacred music and "pops" music. On May 30, the group performed in front of a demanding panel of judges during the Millionaire Music Festival. They received nothing but praise from all three judges—praise that was indeed well deserved for the hard working choir. Besides performing several outstanding and well-attended concerts, the group sent fourteen of its most talented members to P.M.E.A. District Chorus. They included Mark Bailey, MaeLynn Goodman, Bill Hessert, George Moore, Beth Nesbett, Bradley Nichols, Maureen Reeder, Barbara Rightnour, Brent Robinson, Carolyn Rogeaux, Chris Santalucia, David Shover. MaeLynn Goodman, Bradley Nichols, and David Shover proudly represented the Williamsport Area High School at P.M.E.A. All-State Chorus.

These talented musicians and the rest of the members of the choir made quite a name for themselves throughout the state and region. The 1980-81 year was a very successful one for the Senior Choir, filled with many fine accomplishments of which to be justly proud.

SOPHOMORE CHORUS

This year, the sophomore chorus added a new dimension to the word "dedication." Knowing that they were the last sophomore chorus who worked to ring out chords and harmony at W.A.H.S., the talented singers presented one great concert after another. The year began with a complement of 60 sophomores, each singing in their own style. But as the year went on, the group unified tremendously to the point where they earned rave reviews from experienced judges in the W.A.H.S. musical festival. Under the direction of Mrs. Janet Rehman, the chorus presented a sacred music concerts, a Christmas concert, and a "pops" concert in the Spring. "Rehearsals are never boring, quipped sophomore Tim Keller. Despite the sometimes light-hearted attitude towards their work, these students, many of whom are going on with musical ca-

reers, developed into a sophomore choir whose accomplishments, spirit and dedication are not soon to be forgotten.

SHOW CHOIR

The W.A.H.S. show choir is a select group of members of the Sophomore choir and the Senior choir. Being chosen as a member of the Show Choir is quite an honor as the tryouts are extremely competitive. Directed by Mrs. Janet Rehman, the Choir, performs at local church activities, at school functions and various other events throughout the town.

The choir's repertoire includes such songs as "You are So Beautiful," with a solo by senior soprano Carolyn Rougeaux, "Peggy Sue," and a medley that consists of songs from three musical eras. The talented young group was in great demand due to their large audience appeal. They sang songs such as "Making Whoopie" for the older generations, many Barry Manilow selections for the romantic persons in the audience, and few gospel or spiritual numbers. The ability of the show choir to spark excitement in their audience is simply incredible. Anyone listening to this talented young group of very select musicians will know why they are in such demand. The Show Choir can easily make an audience feel like singing along or clapping, and one always walks away from one of their concerts feeling a little better inside.

MUSICAL

This year, the Williamsport Area High School ventured into new dimensions—dramatic musicals. When Mr. Gallup announced that the musical would be "West Side Story," enthusiasm grew remarkably.

After the cast was picked, the enthusiasm continued—through practices, dress rehearsals and the weekend performances. This sense of dedication turned out to be

one of the biggest contributors to the success of the show.

Led by Director Gallup and their never-tiring choerographer, Miss Shelly Steward, the cast spent endless nights preparing for the show. The endless nights payed off. Who can forget the "Dance at the Gym," which featured the entire cast dancing their hearts out, just like their parents did twenty years ago? or the Jets, led by Riff, portrayed by senior John Weaver, ruling the streets only to be challenged by Bernardo (junior Robb Warren) and the Sharks, finally climaxing in the rumble with both leaders being slain? Or the Sharks dancing to "America" led by Bernardo and Anita, played by junior Maureen Reeder? And surely, no one would forget the tear-jerking ending, with Maria (senior MaeLynn Goodman) clutching onto Tony (junior Bradley Nichols) in his last moments of life.

These are just brief highlights of a truly excellent show. On closing nights, some of those tears shed at Tony's death were real tears—tears of sadness knowing the show was over. The cast had grown into a close family, and now the family was splitting. The show was over. True, it may be over, but the memories will last forever.

MUSICAL REVUE

This year's musical revue combined songs from two famous musicals, "Carousel" and "Shenandoah." The cast consisted mostly of members of the Sophomore Chorus and Senior Choir. Tryouts were held after school and the revue was performed here at the High School on January 17th, after only two weeks of rehearsal.

The revue opened up with the song, "June is Bustin Out All Over" sung by the entire cast. Judi Johnson followed up with her solo "What's the use of Wonderin."

Bill Hessert and Beth Nesbitt sang a duet called "When the Children are Asleep," from "Carousel." Soloist Carolyn Rougeaux performed "If I Loved You." This section of the musical revue, dedicated to "Carousel," closed with the moving song "You'll Never Walk Alone."

The second portion of this revue, centered around the musical "Shenandoah," opened up with "Raise the Flag of Dixie," performed by the entire cast. Bryan Hunsinger and Robb Warren followed up with a duet called "Why Am I Me?," and all the men in the cast sang the next song "Next to Lovin'." The revue closed with the song "Freedom" sung by everyone. The co-directors, Mrs. Janet Rehman and Mr. Thomas Gallup, prepared the cast for their performances and Miss Patricia White, a student teacher, accompanied the musical members on the piano. The total success can be attributed to the hard, unfailing work of the cast, at practices and on the night of their performance.

ORCHESTRA

This past year has been a busy one for the W.A.H.S. orchestra. Under the baton of Mr. Walter Straiton, the orchestra performed at several concerts and concluded their year with a trip to Williamsburg, Virginia. In order to finance their trip, the group held car washes and sold such items as stationary and cheese and bologna. To be sure, working toward this common goal of earning enough money to go to Williamsburg helped to unify the orchestra in ways other than musical.

The orchestra's several performances included a Fall Concert in November, a "Pops" concert in January, an instrumental all-district concert in March and a Spring Concert in May.

After the District orchestra auditions in November several members of the W.A.H.S. orchestra qualified for District Orchestra which was hosted by Williamsport.

At Districts in November, members of the Millionaire orchestra qualified to go on to the All-State Orchestra in January with many of the members going on to Regional Orchestra in March.

Branches of the W.A.H.S. orchestra include the Chamber Orchestra which performed at the James V. Brown Library, and the String Quartet, which presented a program at the W.A.C.C. President's Reception in March.

SERVICE GROUPS

STUDENT GOVERNMENT ASSOCIATION

S.G.A. completed one of its busiest years on record. Faced with what sometimes looked like an endless schedule, the S.G.A., helped withdraw a record amount of blood from wide-eyed volunteers in the annual Bloodmobile visit. The always-enthusiastic members manned concession stands stocked with homebaked goodies for after school munchies, sponsored an orphaned child and entertained the student body with the multi-media presentation of "Hard Times." In addition to this, officers who attended the district convention were proud to report that next years convention would be held here at W.A.H.S. One of the highlights of the S.G.A.'s year was the election of Jean Zvikas as Laurel Queen. In the midst of all their work, the S.G.A. never lost their benevolent attitude, evidenced by their contribution to the Frank Forney Fund Drive and the Honor Society. And few who attended or saw them will never forget events like the Valentine's Day Dance or the Christmas Door Decorating Contest. In between all of this activity, the student leaders elected a president and vice president who attended the national convention. Winding things down, the student government helped choose representatives to serve on a steering committee to develop next

year's school. 1981—A year of fast-paced activity for W.A.H.S.'s Student Government Association.

CHEERLEADERS

At the end of the school year, there is not a scoreboard tallying up the number of wins and losses for the Millionaire cheerleaders; in their own unique way, these ladies win by actively and visibly supporting and encouraging others to win. To Varsity Cheerleader Chris Mull, cheering means "supporting our school and trying to raise the spirit of fellow classmates while at the same time, helping the teams to get psyched up and ready to face their opponents." The cheerleaders attend various sports to "give the team support," regardless of whether they are winning or losing. It's the responsibility of these lady Millionaires to cheer on our sportsmen in the face of both victory and defeat. To some of our cheerleaders, winning is not just a higher number on the scoreboard, but rather, as Shelly Weigle says, "giving it the best that you can in the name of good sportsmanship." Bobbi Wagner adds, "Being a leader not a follower—anyone can be a follower." Indeed, the cheerleaders *are* leaders: in cheering, in stirring school spirit, and in supporting our athletes. Co-captain Patty Segraves expressed the group's feelings when she said, "Cheerleading wouldn't be as much fun if we didn't have the appreciative players and coaches to cheer for. They're a real credit to the school." Well done, cheerleaders!!

KEY CLUB

The Key Club, a service organization, is the sponsor of various school activities.

Members of the Key Club faithfully participate in a variety of community drives to raise money for needy groups throughout the area each year.

Every fall, Key Club sponsors W.A.H.S. participation in the annual canned food drive, run by WMPT radio

station. All of the collected cans are then distributed throughout the area to provide less fortunate families with the traditional feasts of the holidays.

Along with the traditional events held each year, the Key Club sponsors a number of new and refreshing events from year to year such as the Apple Booth at the Fall Family Festival, numerous bake sales, and the individualized service offered to victims of hardships, hunger, and extraordinary circumstances. One such service held this year is the Frank Forney Fund Drive. This drive was held to help offset the costly medical expenses due to Frank Forney's illness but more importantly, to show Frank our support at a time when support is needed most.

The Key Club also sponsors events held solely for pleasure, such as the Walt Disney movie, "Billion Dollor Hobo" shown this spring to serve as a break from the day-to-day routine of the students. For admittance to the movie, students were required to contribute two books of green stamps to the Frank Forney Fund. The Key Club's movie served a double purpose both toward helping an individual and in entertaining the student body at the same time.

As a reward for their hard word, the Key Club members attend the annual Key Club convention, this year held in Downingtown, Pa., where members of the various local high school Key Clubs join to exchange new ideas and concepts to provide a better Key Club for each forthcoming year.

BUSINESS ENGLISH CLUB

During the premier year of the Business English Club at W.A.H.S., some memorable moments included the long, hot afternoons during the summer months washing and scrubbing cars. When school began in the fall, one would

think that fund-raising activities would cease. Not so. When classes began, the activities of the Business English Club went ahead full speed. Bake sale after bake sale was followed by candy sales and other fund raisers. "At first glance, I didn't think anyone would want to join the club," said vice-president Renee Bigelow. "But once everyone got to know the people and saw how much fun we have working, lots of people wanted to join." "Work," they did, but they did enjoy themselves. The year culminated in a trip to New York City, where the Billtowners gawked at the Empire State Building and the World Trade Center. Led by Mrs. Edwards, the club members presented the Outstanding Business Student Award to their president, Kim Harstead. "I was so excited," gasped Kim. "It was really a great way to end a great year."

STAGE CREW

As another service group at W.A.H.S., the W.A.H.S. stage crew functions similarly (oddly enough) to the cheerleaders, that is, as the hardworking "invisibles" supporting the "visible." As a result, personal victories are often vicarious. For each production displayed on stage, there are members of the stage crew, under the supervision of Mr. David Ward, hard at work in the control booth. These people work out of the sight of the audience, yet without them, performances would be impossible. Before any presentations are ever staged, members of stage crew must do such things as survey the auditorium, set up microphones, position the stage lights and learn production cues. According to crew member Mary Evers, "We must be available to open up the auditorium and run the systems for both practices and shows." Senior Mike Perry stated his reason for becoming a member of the stage crew was "because of my interest not only in theatrics, but also in the workings behind the scenes of a production." He speaks for many

stage crew members, all integral parts of the "silent kingdom" behind stage successes here at W.A.H.S.

AUDIO-VISUAL AIDES

Known affectionately around the school as "Doctor Dave's Gang," the A.V. Aides are vital to the function of the school. Without these "angels of mercy," the teachers would be without audio visual materials and Mr. Ward, the "mad doctor" himself, would be swamped with requests. The A.V. Aides perform various functions in the A.V. room and around the school: they deliver and collect the film projectors and films, they run the videotapes and the closed circuit television studio, repair broken equipment and dub tapes.

Their reasons for assisting Mr. Ward in the A.V. alcove vary. Some choose the aides' life because they like the difficult workload or because a friend recommends the work to them. Some, like David Rhodes, are there to gain knowledge of the equipment and electronics because they are going to pursue a career closely related to electronics and audio-visual technology.

Through their battle with stubborn equipment and unrelenting teachers' demands, they never fail to follow Mr. Ward's example in being cheerful and willing to rise every day to the calls of duty.

OFFICE AIDES

There are a group of students at W.A.H.S. who enjoy being of service to their fellow students, teachers, and principals. Through dedication and hardwork, the office aides have a background to be proud of. These students forfeit their study halls to go and work in the offices, answering the telephones, writing slips, filing, running errands and collecting absentee cards.

As senior Michelle Liddic puts it "You get the feeling you're doing something good for your school." All the

office aides claim that office security is good and their group is really like one big family. There are varied ways of becoming an office aide. You can be recommended by a teacher, contacted by a principal or just walk into the nearest office explaining that you would like to help out. It seems apparent that being an office aide gives you an opportunity to improve your skills, make friends and have fun.

LAB ASSISTANTS

The defining qualities of a lab assistant are quite elusive, since there are so many assistants and they have such varied personalities. For some, being a lab assistant means to be "willing" to help others and do the best job that you can," "doing what you set out to do in the beginning," or "earning a feeling of accomplishment." Others think that it would help if one were "50 percent helpful, and 50 percent mad scientist!" Either way, a lab assistant must be willing to accept the responsibilities of grading papers, preparing labs, cleaning, making solutions, running dittos, recording grades, making ice, babysitting the "Boss," telling good jokes, and catching snakes!!

After his assigned tasks are completed, a lab assistant can do what ever he likes with his free time. One may choose to studiously do homework, go to the library, do other work for the teacher that is not related to the lab, or one can choose *not* to be studious. The most memorable moments for the assistants come during this free time; one assistant had the good fortune to beat Mr. Bonaslawski at arm wrestling. One got ditto ink all over his hands and face, and one was even allowed "to perform inhuman experiments with books, pencils, desks, and even people!" What ever they do, the presence of the lab assistant eases the teachers' work load so that he can instruct and provides the teachers with some heartfelt comic relief.

PUBLICATIONS

LA MÉMOIRE
EDITORIAL

The 1980-81 *La Mémoire* staff has again survived the bitter blast of impossible odds. After cranking out tons of copy, staying for late, late, late night sessions, organizing and taking pictures of squirming, whining underclassmen, subsisting on Pepsi and bad jokes, and hearing the criticism but somehow missing the praise, *La Mémoire* has constructed another pictoral personification of life as it exists at the Williamsport Area High School.

The work begins in early September and continues relentlessly until the dying days of the school year. Nancy Mextorf, Editor-in-chief, guided the infant book safely through many menacing deadlines and with the help of the "handfuls of dedication," helped it arrive safely, completed on June 5, 1981 at 12:07 a.m. in D-209.

Besides working on the book, selected students earned the honor of attending the CSPA and the PSPA conventions during the year. There, they absorbed new ideas on layout form, caption writing, illustrations, and expressive writing.

After a grueling year, the staff of *La Mémoire* can look back with some degree of satisfaction knowing that the yearbook possesses that unique ability to mellow and beautify with the passing of time.

BILLTOWN BANNER

The dedicated members of the *Billtown Banner* staff are burdened with the responsibility of getting a newspaper to the students every two weeks. But after publishing seventeen regular bi-weekly issues and six extras, some members of this closely knit staff still get a chance to participate in literary activities outside of school. In

the Scholastic contest, Jessica Strasburg won two blue ribbons and five gold keys for her photography. Mary Bernardi received a gold key for her entry in the critical essay category, and Walt Colley had the only district portfolio that was sent to New York for special judging. Members of our school's newspaper staff are true artists who take pride in their writing; this was proven to be true when the Senior Division of the Ready Writing Contest was won by senior Mary Bernardi. At the PSPA convention, held in Lancaster, various members of the *Banner* staff managed to win awards because they had, as Editor-in-chief, Ed Hurwitz noted, "a combination of humility, pride, and savoir faire." Photographer Walt Colley won a Keystone, one first palce, and one third place; Ed Hurwitz posted two first places and three second places; and Mary Bernardi received a Keystone, three first places, two second places, and one third place. Overall, at the PSPA Convention, the *Billtown Banner* staff placed second among all other schools which were represented. As *Banner* prepares to roll into its third year under Martha Hasting's advisorship, it appears as if more space should be cleared in the trophy case!

CHERRY AND WHITE

Since 1895, when the first Cherry and White was printed, the magazine and the individual members of it's staff have had plenty of time to acquire honors and awards—many of both have been acquired in those eighty-six years—but that doesn't make winning an award any less special. Hearing, as we did in November, that *The Cherry and White* had taken a first place award in the Columbia Scholastic Press Association evalulations was memorable, but the blizzard of awards won by the magazine and its staff at the Pennsylvania School Press Association Convention in Lancaster the same month was even more exciting.

What makes the *Cherry and White* experience worthwhile? Not only do regular staff members develop a feel-

ing of pride and accomplishment in working on the literary magazine, but the contributors also "feel good when they get something published." Said Sue Bachman, Co-editor of the Cherry and White, the publication "gives students an opportunity to see what their classmates are achieving in creative writing, photography, and illustration. It gives those who are talented in these areas a chance to share their expressions of out with others."

Working for the magazine, according to senior Betsy Stearns, "gives me a sense of belonging, I feel as if I'm part of a greater whole, helping to create something special for everyone to enjoy."

The magazine led by Editor Geoff Haun and co-editors Sue Bachman and Sherryn Lehotsky received a Keystone award—the highest rating PSPA bestows on any publication. Then there were the individual Keystones: Geoffrey Haun, Mary Bernardi, and Gordon Wenzel for short stories, Melvin Conrad collected a second place for illustrations. All in all, it was another year of success for Pennsylvania's oldest scholastic publication and next year promises more of the same.

LA MÉMOIRE BUSINESS

Just as the backbone is the main support and lifeline of the body, so is the publication business staff a necessary and vital part of all successful school publications. The *La Mémoire* Business Staff, under the competent management of seniors Jean Essip and Katie Hopper is no exception. The members of "Mr. T.'s" business staff play a crucial role in front of and behind the scenes of both the *La Mémoire* and *The Cherry and White* by promoting, distributing and sellings ads for each publication. The job of soliciting for ads began last August, a time when most of us are still squeezing the last bit of life from our vacations. The prospect of sacrificing part of summer vacation is not too inviting, but this is a minor detail considering the fact that unless funds are

raised, publications of *Billtown's* yearbook and literary magazine would be virtually impossible. As soon as all the ads are sold—usually by the month of November—publications business staff members turn their attention toward the selling of yearbooks. Along with the responsibility of yearbook sales, is added the task of selling and distributing *The Cherry and White*, which is offered in conjunction with *La Mémoire*. Next year, all these responsibilities will be shifted to the new business managers, Chris Poretta and Brenda Wascher, who will have to face such persistent problems as rising costs of publication and an increase of six hundred students with the incoming ninth grade. Being a member of the publication business staff may sometimes seem a thankless job, but as one business staff member explained, "To reach your goal and pick up some good friends along the way makes it all worthwhile."

CLUBS

FUTURE HOMEMAKERS OF AMERICA

The Future Homemakers of America Club here at W.A.H.S. is a group of very remarkable young ladies who devote their extra time to learning about good home practices and to providing service to the school and community. Their service projects and contributions to different charities serve to help these organizations to achieve their goals as well as give the members of the club valuable experience in homemaking and service work. Some of their contributions this year include entering the "Dress a Doll" contest, sponsered by the Bank of Central Pennsylvania, helping needy children in Williamsport and preparing twelve dozen sticky buns as a service project for the Divine Providence Hospital Auxiliarys' Bazaar!!

The club is not "all work and no play" though, the club members do get a chance to attend various conventions where they can learn various homemaking techniques and have fun at the same time. Among some of

these conventions attended this year were a trip to the "Holiday House", a presentation by the Duboistown Garden Club and a Halloween party at the Muncy High School. To round out a very satisfying and complete year, the F.H.A. members attended the State Convention held at Host Farms in Lancaster, Pennsylvania.

VOCATIONAL TECHNICAL CLUB

Vo-techers, those fascinating people you see walking through the halls wearing the "tech rat" on their jackets, are back this year in full force. Led by Dave Hubbard, the Vo-tech club president, the group set some personal goals for themselves. Their goals ranged from success in drafting, automotive repairs, and cosmetology, to mechanical engineering, welding, and masonry.

At Tech people learn on-the-job-training that will help them in the years to come. Those who are in Vo-tech are tomorrow's skilled craftsmen, combing alternate nine weeks at WACC and WAHS, and are evaluated on their skills and abilities.

Next year, the number of Junior Vo-tech members is expected to be up from that of this year. And although the Seniors are leaving for jobs or training programs, they will leave behind them a record of hard work and service, and in their places, this year's Juniors will carry on the good name of WAHS "Vo-tech."

SPANISH CLUB

In the midst of the many activities which occupy the time of a large percentage of students in our school, stands the Spanish Club. The Spanish club is composed of students who primarily will be using the Spanish language in their future plans. In the many times that the words "bake sale" were uttered on the morning announcements, several belonged to the Spanish Club! "It was really terrific how everybody chipped in and baked something for the sales," stated Melissa Phillips. But it

was the skating party that really got things "rolling" at the beginning of the year." Then, later in the year the "Spaniards" enjoyed a night of pizza and bowling at the YMCA. "The whole night was really exciting," commented Lori Miller. "That was probably the most fun we had all year," added Mindy Levinson. The club also began a newspaper especially for Spanish students, called "El Periodico." This paper provided some interesting information for Spanish-speaking students. The year concluded with a formal banquet at the Antler's Club. Awards were given to those students who worked harder and longer than others.

PLAYS AND PLAYERS

SENIOR CLASS PLAY

All students need something in which they may "lose" themselves; one of the things students chose for this purpose was participation in the senior class plays. The annual senior dramatic effort this year was a fantastic opportunity for fledgling students to learn to actually "become" the character they portrayed. It is rather difficult at times to become a different character and to be convincing at it. Mrs. Hunter, the director of *The Absence of a Cello*, helped each of them overcome his self-consciousness. Once on stage, though, it was easy for the actors to block out everything, to just "be" the character, to "be" the play. When an actor is on stage, he cannot think "Who's out there? Who's laughing? Are they laughing at my jokes?" All of those things come before and after the action of performing. Senior Becky Golamis commented about her part in the play: "When I stopped speaking and had to just sit still, that's when the nervousness came and when it was very hard to stay in character. The best part about playing a crazy kleptomaniac of an old lady was afterward, when people would say 'You were so funny! You stayed in character all the way through—I can't *believe* that was *you*!' That's when

I knew I had achieved something good and fulfilling; I was capable of going outside of myself." The senior class play is then, both an education for the actors, and an entertainment for the audience. Truly, the best of both worlds.

SPEECH AND DRAMA

The 1980-81 edition of Speech and Drama Club, coached by Mrs. Miriam Hunter, had an extremely varied performance season. Comedies, tragedies, and topical plays, including an original play by Keith Wagner, entitled "Daddy," highlighted a great year of presentations in D-Large group and in the auditorium. They also presented a play in the planetarium, with the help of Mr. Jan Turzanski. Among the plays offered: "Love of One's Neighbor," "The Lottery," "Pen of My Aunt," "Bread," "The Dear Departed," "The Neighbors, "Opening Night," "The Importance of Being Earnest," "Thunder on Sycamore Street," "The Necklace," "Send Me No Flowers," "The Last Eligible Man" and "Sunday Costs Five Pesos." Also presented was a scene from "The Sand Box," "The Silver Chord," "Diary of Anne Frank," "Come Blow Your Horn" and "Antigone." The Drama Club offered, in addition, "Luncheon for Three" and the "Mechanical Maid." With a season like the one just ended, it would be hard to imagine one to top it. But next year, with the coming of the freshman and sophomores, Speech and Drama promises to provide an even more diverse selection, and a great opportunity for anyone who's been bitten by the acting bug to give it a good scratching!

LA MÉMOIRE 1982

WILLIAMSPORT AREA HIGH SCHOOL
WILLIAMSPORT, PENNSYLVANIA
VOLUME SIXTY-THREE

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LA MÉMOIRE

ACTIVITIES SECTION

[Pictures and their captions omitted in printing]

S.G.A.

Student Government, a prominent group that emphasizes dedication and responsibility, was again busy planning many activities for the student body at W.A.H.S. Money-earning projects, like the sale of stuffed animals. Wolfgang candy, cheese and sausages, and numerous cake sales and car washes enabled the S.G.A. to sponsor various activities. In the first week of school, S.G.A. held orientation for the freshmen and sophomores to aid these new students in adjusting to their new school. Many students who attend W.A.H.S. participated in the annual Christmas door-decorating contest, for which the S.G.A. awarded prizes honoring the most original door design. The holiday season was topped off by the various dances including Homecoming, Christmas Formal and of course, the Valentines's dance. Thanks to the members who decorated and arranged, these dances were a big success. This year's District Convention for the Student Government Representatives, held at W.A.H.S. was a success and showed other representatives from other cities and towns in Pennsylvania how an efficient student government can accomplish different tasks with good results and superb results seem to be the expectations of our S.G.A., because no one expected anything less than 100% cooperation from the bloodmobile. In all, 207 pints of blood were collected during the bloodmobile visit, and those students who were unable to donate blood * * *

KEY CLUB

The 1981-82 Key Club emerged with a very successful year under the leadership of their President, Mark Lee, and their advisor, Mr. Dick Creveling. This year was Mr. Creveling's first year as the advisor of this prestigious group and he should be commended for an organizational job well done. Mark also showed his initiative and leadership in fulfilling the role of President of the Key Club here at WAHS. He was presented the President's award at the Key Club District Convention. Our local club has increased by thirty members this year, bringing the total membership to seventy-eight, and interest has been expressed by at least thirty people for members this next year.

The first of many activities sponsored by the Key Club was a cookie and bake sale held at the Arts and Crafts Show in the fall. Other fund raisers included several car washes, ushering at the Consistory, and of course, their big project of year, the P.D. Mitchell Memorial Runathon, P.D. Mitchell was a well-known leader of our community, as well as a member of the Kiwanis Club. The Runathon provided funds which the Club in turn donated to the J.V. Brown Library to buy books as a memorial to Mr. Mitchell. Among other services and activities in which the Club participated were Christmas caroling for the elderly, holding their own Christmas concert, hosting trips to such places as Philadelphia and attending Kiwanis Club luncheons to learn about mutual interests, helping to run the Special Olympics, visiting the community theatre, serving as guides and ushers for P.T.S.A., hosting the teacher's teas, and sponsoring the canned food drive to provide food for those in need.

Thanks to the cooperative and initiative demonstrated by the WAHS Key Club as a whole, they successfully exemplified the International Theme, "Pursuing Tomorrow's Potential."

FHA HERO

What is the F.H.A.?! Why, that's the Future Homemakers of America, a group of young women who learn good home practices and help in their school and community through participation in a wide range of projects. They are basically a service group trying to better themselves so that in some way, they may better their community.

The 1981-82 school year was filled with many such projects and successes.

Holiday favors were made and delivered to the Park Home, whose residents greatly appreciated the adding of a little cheer to the Christmas season. They sponsored the "Snacking Awareness Day" here at WAHS, which involved handouts of a variety of nutritious and healthful snacks. A Turtle Patch sale, which offered turtle-shaped patches for holey jeans, was held as another fund-raising routine.

An end of the year celebration was held in the form of a dinner for members and their families. The year of hard work and diligence did not go unnoticed or unrewarded; at the dinner several members were given awards for increasing membership and for significant participation.

MARCHING BAND

Concert Band

The Concert Band season starts the week after marching band season ends. The concert band program emphasizes tone quality, blend, balance, and technique. These aspects of musicianship were taught during the first period for the Millionaire Band, and the second period for the Top Hat Band. The bands worked on comparatively hard music; for the first concert, on the twenty-second of February, the Top Hat Band played "Variation Overature" by Clifton Williams. The Millionaire portion

of the program featured Alfred Reed's "First Suite for Band", a medley from the Broadway musical *Evita*, and "Hoak Raskolniki (A Dance for the Old Believers)" by David Holsinger.

The bands participated in several festivals. The ninth grade band sent representatives to the Lycoming Band Directors' Association Junior High Band Festival. The two day festival was held at Jersey Shore Area High School on the March twelfth, and thirteenth. The festival centered on musical endeavors; the band put together a concert under the direction of Henry Neubert, Associate Professor on the Music at Ithaca College School of Music. The final concert featured a clarinet solo by one of our students, Kelly Stetts.

Some members of the Millionaire Band attended a similar festival for high school students. This festival was held at Hughesville High School, and was conducted by John Miliauskas, Director of Bands for Lake Lehman High School. The concert featured "Novena" by James Swearingen, and held on Saturday, December fifth.

Both bands faced state adjudicators on April twenty-sixth. The Millionaire Band presented three numbers one being "Satiring Dances" by Norman Dello Joio; the Top Hats, "Variation Overature" by Clifton Williams.

The Millionaire Band participated in an adjudication festival in South Williamsport with a band from Canada and one from Florida. The bank housed members of the Canadian band for two days, and participated in a number of social events with them.

The bands presented their spring concert on May twentieth. The Program consisted of a mixture of serious concert band literature, marches, and popular tunes. The final activity for concert band was the traditional picnic at Knoebals Grove, on May 23. They played their concert, listened to the jazz bands, and enjoyed the park.

The Millionaire Music Festival event that brought bands from far and wide to compete in concert band, jazz

band, indoor guard, and parade competitions, was held May twenty-eighth, twenty-ninth, and thirtieth. The members of the band spent these days running errands at the high school, meeting new people, and, as always, enjoying being a part of the WAHS band.

COLOR GUARD

Time, endurance, and strength, not only of body, but of mind, are requirements that came in handy when one becomes a member of the Williamsport Colorguard. A necessary part of the Millionaire Marching Band, the group added that extra flourish and finess to the band. To be good at what they do, many long hot summer days were spent in practice. Come fall, school days expanded into the night hours, but it all seemed worth it when the Guard took to the field; a unit, whole and complete, which brought home first place honors time and again. After numerous competitions and hot bus trips, followed by grueling practices the sight of the home crowds cheering and rising to their feet in a standing ovation made all their time and hard work worthwhile.

This year, the product of their sweat and determination resulted in many well-earned laurels, topped off by bringing home a coveted First Place in the Tournament of Bands.

The girls who comprised this year's group certainly made the high school proud. Their display of discipline and elegance revealed the unity and cooperation that existed within their group.

TOP HAT BAND

The Top Hat Marching Band, comprised entirely of freshmen, made its debut last fall at the football games. This addition to the W.A.H.S. instrumental music program serves to prepare the ninth graders for the Millionaire Band in which they will be participating, in following years.

The marching band season started for the Top Hats in August, with a week of evening rehearsals. Then practice was held regularly on Mondays after school to perfect their show.

The ninth graders, led by drum major Margaret Burns entertained for pregame and halftime at football games, and cheered enthusiastically for our football team. The band's show was made up of familiar tunes. Opening with "Hand'em High", with a trumpet solo by David Waldmen, and the drum solo, "Thank God I'm A Country Boy", featuring mime-like guard work, and mallet percussion played by members of the band. The closing number was "Theme from Ice Castles". They lent support from the stands with spirited renditions of our pep song "On Wisconsin", other college pep songs, and "Musical Cheers."

STAGE BAND

The synchronized rhythm of the drum, the brassy swells of trumpets and trombones, and the harmonious blending of saxophones helped make the 1981-82 editions of the W.A.H.S. stage bands two of the finest heard in many years. *Two* of the finest? Yes! Because of the number of students wanting to play in the Williamsport Area High School Stage Band, applicants had to be divided into two groups.

Both bands work under the direction of Mr. Donald Griffith, who also directs the Roosevelt Middle School's band.

Since the bands are non-competitive, they devote their energies strictly to concert performances. The performances this year have included special audiences from Mansfield State College for adjudication, our own SGA conventions, and the Millionaire Music Festival, not to mention the bands' own regular concert audience. The bands combined force consists of an impressive array of eleven saxes, seven trombones, seven trumpets, three

guitars, and two basses, two keyboards, four drums sets and two percussionists. However, some of the positions will be vacated next year, as graduating seniors, Burris Harrison, John Novalis, Chris Straka, Lenny Federowicz, and Mark Webb leave seats to be filled in the sax, bass, and brass sections. The band's finale will be at Knoebals Grove, where they will play for the band's annual picnic.

ORCHESTRA

A love of music, the thrill of working toward a common goal, the freedom to be a little crazy at times—these aspects serve to transform a group of students with instruments into a hard-working, fun-loving orchestra. Although the members of the orchestra enjoyed many relaxed and fun times together, a lot of hard work went into preparation for a concert. The addition of this year's freshmen provided the group with an extra challenge. Their first concert of the year was given on January 11 at Saint Boniface, a task that could not have been accomplished without the dedicated leadership of Mr. Walter Straiton, W.A.H.S. orchestra director.

Another first for the Millionaire Orchestra was the exchange program with Haverford High School. On the weekend of April 3rd, the orchestra ventured to the outskirts of Philadelphia, where they gave a combined concert with the Haverford High School Orchestra. Two weeks later, the same concert was given at W.A.H.S. with the Haverford Orchestra as our guests.

As a grand finale, on May 26th, St. Boniface once again echoed with sounds of the Millionaire Orchestra. The last concert of the year ended with an exhuberant demonstration of Tchaikovsky's Second Symphony.

A subdivision of the orchestra is the Chamber Orchestra. Consisting of 20 outstanding young musicians, the Chamber Orchestra is required to rehearse extra music on its own time. Upon completing this task, the group performs Christmas carols at various places, sometimes to aid in orchestra fundraisers.

SHOW CHOIR

Through rigorous auditions, sixteen members of the Senior Concert Choir were selected to form the prestigeous Senior Show Choir of 1981-82. The group gave many performances throughout the year, but concentrated its effort during the holiday season. The Show Choir was a favorite form of entertainment for various organizations and associations, like the Women's Club and various churches. The most important performance of the Christmas season was probably the annual evening show for the Williamsport Rotary Club. The performance this year entailed not only singing, but choregraphy as well. Together, the two forms presented a visual delight to the audience and left the audience with a feeling of joy and good cheer.

Adding another dimension to the W.A.M.S. musical talents, was the formation of a second Show Choir, the Freshman-Sophomore choir members. With a compliment of 36 students, they progressed marvelously and made W.A.H.S. proud by flourishing during the year's trial period. Performances and schedules were shared this year between the two show choirs. The usually hectic holiday season was less of a hassle, with each choir handling a share of the total performance list.

To wrap up the year, both show choirs united to give a "Pops" concert. Their final performance convinced many of the members to again audition for next year.

SENIOR CHOIR

Under the direction of Mrs. Thomas A. Gallup, the Senior Concert Choir has sung through another school year producing great sound and having a lot of fun doing it. The choir represented the high school in the way they knew best; the finely-tuned group performed a total of six times through the '81-'82 school year. The music performed ranged from traditional sacred pieces to popular contemporary songs. As has become somewhat of a tradi-

tion, the choir again traveled to the Pine Street United Methodist Church to perform their Sacred Heart concert. The concert consisted of a selection of religious and sacred pieces. This year's Christmas concert was one of unparalleled excellence. Originally planned for December, the concert had to be postponed until January, due to inclement weather. As a follow up to the Christmas concert, the Spring Pops concert was held in April at W.A.H.S. in the commons. Greeted by an appreciative audience, the choir performed with the same degree of excellence. This year, the W.A.H.S. choir was represented by 27 students at the District Festival, held in Sunbury. From districts, 10 students were chosen to attend the Regional Festival, a competition which will be held in Philadelphia in fall.

Earlier this year, the choir found itself in need of funds. To alleviate this problem, the choir went out and diligently sold cheese and sausages to area residents. Both choirs combined their selling efforts and managed to make quite a fair profit. Looking back, this year's choir undoubtedly will be remembered as one which overflowed with achievements, with spirit and talent to match.

THE CHERRY AND WHITE

The Cherry and White has the unique job of creating school's literary magazine. This, the oldest literary magazine in Pennsylvania, relates the style and the imagination of participating students as well as staff contributers. The work begins during the heat of the summer with staff work sessions and continues throughout the entire year, with the publishing of five issues annually, filled with poems, short stories, as well as photography. Throughout the year the staff members seek to encourage interested students to submit any art in the form of literary material that may be used in further publications.

This year, *The Cherry and White* captured the highest award given to any publication by the Pennsylvania School Press Association, the coveted Keystone Award.

The staff also participated in various activities which included the attendance of the annual Columbia School Press Association, held in New York City. Despite the fact that *The Cherry and White* is basically funded by the Business Staff, a bake sale was held in order to retain the necessary funds the staff needs to survive.

As in most organizations, the dedication and hard work was visible by the success of the magazine.

BILLTOWN BANNER

First place rating from Columbia Scholastic Press Association, and an All-Columbian Award for Graphics—certainly that national recognition would keep us interviewing, writing, typing, and waxing for another year.

Probably *Billtown Banner* staffers know better than anyone the exciting number of individuals and groups who excel and fulfill school, community, and personal expectations. We try to reach them all, and to let our readers reach them also.

A summer issue welcomed students in September, reminding them of Maynard Ferguson's trumpeting at the Susquehanna Boom Festival. When "Beatlemania" came to the Capital Theatre, BANNER reporters met the men behind the scenes of that popular Broadway show. Kurt Gingrich and Vicki Albarano saw that spectacular from in front of the stage and from behind the scenes' When Dr. Demento, nationally known disc jockey, performed at Williamsport Area Community College, Richard Cardene absorbed that insanity and shared it with our readers who could not attend. Because Kurt encouraged community interest in the Lycoming County Historical Society's 200th anniversary, BANNER appears in the Society minutes, proof of our broad scope of coverage.

BANNER readers knew when hunting and fishing season opened and whether they could anticipate a catch. They knew who won ready writing, salabes and scholastic.

SPEECH AND DRAMA

Continuing their tradition of presenting the high school with excerpts as well as full-length renditions of many humorous and provocative plays, the Speech and Drama Club filled the 1981-82 school year with many memorable theatre productions. The year's productions took place in many locations about the school and involved several forms of drama. The club performed primarily in the D-large group instruction room, but on occasion branched out to the auditorium and library. They not only performed shows for students, but for various church groups, the Red Cross, and the SGA Spring Convention as well.

Under the direction of Mrs. Hunter and aided by Mr. Dan Keefer, the Speech and Drama Club produced many popular plays including "The Odd Couple," Cyrano de Bergerac."

LIBRARY AIDES/LAB ASSISTANTS

Dedication, hardwork and lost study halls, are all included in the life of a libary aide. Stamping out books, signing passes, and arranging books in an orderly fashion are just a few of the tasks that must be performed by the library aides. Although many people take these people for granted, we must think "Where would we be without them?"

LAB ASSISTANTS

A lab assistant's tasks are many and varied. He usually has to mix solutions, grade papers, print dittos, record grades, clean the room, catch snakes, and most importantly babysit. Lab assistants are free to do whatever they please once all the work is done. Some serve as a model student and finish homework or study, while others prefer to do nothing. No matter what they do, teachers would be swamped with work without these "angels of mercy."

OFFICE AIDES/AV AIDES

OFFICE AIDES

The group of students who give up their study halls in order to help in the offices say that "it's worth it." To become an office aide, one needs to go to any office and volunteer his services. An aide's duties include writing passes, filing, collecting absentee cards, answering the telephone, and just plain running errands. In return, you have the opportunity to make friends, improve your skills, and have fun.

A.V. AIDES

"Doctor Daves Gang," as the A.V. aides are known, performs various tasks around the school as well as in the A.V. room. They must deliver and pick-up films and projectors from teachers, dub tapes, repair equipment, run video tapes, and operate the closed circuit television studio. Without these helpful students, who must also put up with stubborn equipment and demanding teachers, ease Mr. Ward's workload and provide everyone in the school with A.V. materials.

Some students become A.V. aides on recommendations from friends. Others are trying to learn more about the equipment or electronics in order to help them pursue a related career.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

COMMONWEALTH OF PENNSYLVANIA)
) ss
COUNTY OF LYCOMING)

AFFIDAVIT OF LISA CAROL BENDER

LISA CAROL BENDER, being duly sworn according to law, deposes and says:

1. I am a plaintiff in the above action. I am familiar with the allegations in the complaint and with the facts pertaining to those allegations. The statements set forth in the affidavit are based on my personal knowledge.

2. In September of 1981 during the third week of the fall semester of my senior year, a fellow student, Morris Braggs, and I met with the principal of Williamsport Area High School, Mr. Wayne Newton, concerning obtaining permission to have a voluntary non-denominational prayer and fellowship club during the extracurricular activity period. He told us that we would be allowed to meet but that we could not use the school's public address system, newspaper or bulletin board to announce, advertise or otherwise promote our meetings. We agreed to abide by this policy.

3. At the first meeting of Petra, there were about 45 students present. The school had a student body of about 2400. The students at the meeting were from numerous denominations and religious groups. My present recollection is that the denominations represented at the first meeting included Baptists, Presbyterians, Pentecostals, Lutherans, and Brethren. At our first meeting, the students read a passage from the Bible, without comment. They shared certain prayer requests and had a prayer

time. During the prayer time, a number of students prayed out loud about the requests.

4. The faculty monitor was physically present in the room during the meeting, but did not take part in any of the students' religious activities or discussions. The monitor had been selected by the school. The monitor took attendance and spent the time correcting papers.

5. At the second and last meeting of Petra, there were about 20 students present. We met briefly and discovered that the school was not going to allow us to meet again. We had a brief prayer time about the situation and returned to our homerooms.

Respectfully submitted,
/s/ Lisa Carol Bender
LISA CAROL BENDER

Sworn to and subscribed
before me this 4th day of
May 1983.

/s/ Elaine A. Ignico
Notary Public

My Commission Expires: May 17, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

[Filed May 6, 1983]

STIPULATION

AND NOW, this 6th day of May, 1983, pursuant to a request made by your Honorable Court, it is hereby stipulated between and among Gerald W. Seevers, Esquire, Attorney for Plaintiffs, Nathan W. Stuart, Esquire, Co-counsel for Defendants, and David R. Bahl, Esquire, Co-counsel for Defendants, on behalf of their respective clients, as follows:

1. *FACULTY ADVISORS.* The Williamsport Area High School does not have a written policy concerning student clubs, the role of adult advisors of such clubs or who those adult advisors must be. There is, however, an unwritten policy of the Williamsport Area High School that each student club have an adult advisor who is generally a faculty member or another employee of the school district. In some circumstances, parents of student club members serve as adult advisors.

The principal, Wayne Newton, and his administrative staff make decisions as to whom the faculty advisors will be. Selection is based upon the nature of the particular club and corresponding background of the faculty member. Although students may request a particular adult advisor, the principal and his staff have final approval as to who will serve as an advisor to a student club.

2. *BULLETIN BOARD AND PUBLIC ADDRESS SYSTEM.* Each student club has a bulletin board assigned to it, with the club name at the top. This bulletin board may be used for announcements or displays. During morning announcements the club is permitted to

announce over the school public address system the times for its meetings. The clubs are not required to use the bulletin board or make announcements over the public address system.

/s/ Gerald W. Seevers,
GERALD W. SEEVERS, ESQUIRE
Counsel for Plaintiffs

SAMUEL E. ERICSSON, ESQUIRE
KIMBERLY W. COLBY, ESQUIRE
CURREN TIFFANY, ESQUIRE
Co-counsel for Plaintiffs

/s/ Nathan W. Stuart
NATHAN W. STUART, ESQUIRE
Co-counsel for Defendants

/s/ David R. Bahl
DAVID R. BAHL, ESQUIRE
Co-counsel for Defendants

APPROVED BY THE COURT THIS 6th DAY OF MAY, 1983.

/s/ William J. Nealon
NEALON
Chief
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' BILL OF COSTS AND ATTORNEYS' FEES

I. INTRODUCTION

On August 11, 1983, plaintiffs served their request for costs and attorneys' fees. The defendants hereby object to the taxation of any costs or the assessment of any attorneys' fees against them for the following reasons:

First, this matter is now on appeal and a final judgment has not yet been entered against all of the defendants. Therefore, no costs should be taxed until the appeals process is completed.

Second, even if plaintiffs' request for costs were appropriate for consideration at this time, plaintiffs have attempted to recover costs which are not compensable under 28 U.S.C. § 1920 or Rule 54 of the Federal Rules of Civil Procedure.

Third, plaintiffs are not parties who have prevailed on civil rights claims, and they are not entitled to attorneys' fees under 42 U.S.C. § 1988 as a consequence.

Fourth, plaintiffs' request for attorneys' fees is plainly deficient under the established principles of this Circuit.

Accordingly, plaintiffs' bill of costs should be rejected.

II. PROCEDURAL HISTORY

Plaintiffs brought this action in June of 1982 against the defendants, The Williamsport Area School District and certain individual defendants affiliated with the School District. Plaintiffs sought both declaratory and injunctive relief against the defendants, and sought to

recover under constitutional theories and pursuant to 42 U.S.C. §§ 1983 and 1985(3).

After some discovery was taken, defendants moved for summary judgment; the plaintiffs filed a cross-motion for summary judgment on their Complaint. At issue, in essence, were two claims: (1) whether the defendants' conduct violated plaintiffs' right to the free exercise of their religion and (2) whether the defendants' conduct violated plaintiffs' right to free speech.

By Order dated May 12, 1983, this Court granted summary judgment to defendants insofar as plaintiffs' free exercise claim was concerned and to plaintiffs insofar as their free speech claim was concerned. On June 10, 1983, one of the individual defendants affiliated with the School District, John C. Youngman, Jr., filed a timely notice of appeal from the Court's award of summary judgment to plaintiffs.

III. ARGUMENT

A. *Taxation of Costs and Assessment of Attorneys' Fees Is Inappropriate until the Appellate Process Is Completed.*

Rule 54(d) of the Federal Rules of Civil Procedure authorizes this Court to award costs to the prevailing party in a case. Assuming, for the sake of argument, that plaintiffs are the prevailing parties in this litigation, even though they were not successful with respect to all of their claims, Rule 54 nevertheless allows this Court, in its discretion, to "postpone imposition of . . . costs until final disposition of the cause." 6 *Moore's Federal Practice*, ¶ 54.70[5] at 1323 (footnote omitted).

Here, in a case which presents close questions of law, a timely appeal has been filed by one of the defendants. A reversal by the Court of Appeals of this Court's decision in favor of plaintiffs would, because of the nature of the declaratory and injunctive relief sought, inure to

the benefit of all defendants, and would change plaintiffs' position from that of prevailing parties to that of losing parties not entitled to costs of any sort. In these circumstances, the defendants submit that this Court should refrain from awarding any costs until the Court of Appeals has made its decision.

Just such a ruling was made in *Brown v. American Enka Corp.*, 452 F. Supp. 154, 160 (E.D. Tenn. 1976), where the Court denied taxation of costs in favor of a prevailing party in a civil rights action when an appeal was pending. In language instructive in this case, the Court stated:

> Costs should not be allowed until the appellate process is complete and the action has been remanded to this Court for entry of final judgment . . . . This is because, should the costs be allowed to the [prevailing party] now, if the Court of Appeals reversed the judgment of this Court on appeal, it would appear the [non-prevailing party] might be barred illogically and contrary to the statute, from taxing the costs against the [prevailing party]. (Citations omitted.)

See also America Infra-Red Radiant Co. v. Lambert Industries, Inc., 41 F.R.D. 161 (D. Minn. 1966) (taxation of costs continued pending decision on petition for certiorari).

Accordingly, plaintiffs' request for costs should be deferred until the appellate process is completed.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

PLAINTIFFS' REPLY TO DEFENDANTS' OBJECTIONS TO PLAINTIFFS' BILL OF COSTS AND ATTORNEYS' FEES

INTRODUCTION

On May 12, 1983, this Court awarded summary judgment to the plaintiff students. The Court held that "*under the precise undisputed facts presented* the defendants had created an open forum for the plaintiff students' use, had excluded the plaintiffs by reason of the content of their speech, and had not demonstrated that the Establishment Clause required such discrimination." (Op. at 43). Thus, the plaintiffs prevailed in their suit for a declaratory judgment that they should be allowed to meet for religious speech at Williamsport Area High School.

As this Court recognized, the issue involved in this case was "an interesting, yet difficult and volatile area of constitutional law." (Op. at 1). The Court found it necessary to issue a forty-six page opinion to explain the legal considerations involved.

I. A PREVAILING PLAINTIFF SHOULD ORDINARILY RECOVER ATTORNEYS' FEES UNLESS SPECIAL CIRCUMSTANCES WOULD RENDER SUCH AN AWARD UNJUST.

The plaintiff students brought this action under 42 U.S.C. 1983 in order to vindicate their First and Fourteenth Amendment rights. Therefore, the awarding of attorneys' fees under 42 U.S.C. 1988 is appropriate. Indeed, as the Supreme Court has recently said, "[a] prevailing plaintiff ' "should ordinarily recover an attorney's fee unless special circumstances would render such an

award unjust.'" *Hensley* v. *Eckerhart*, 51 U.S.L.W. 4552, 4553 (May 16, 1983).

The purpose of Section 1988 is "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Id.* The awarding of reasonable attorneys' fees in civil rights litigation is necessary to ensure that competent counsel will be available to represent persons whose fundamental constitutional rights have been violated. This is particularly necessary in cases, such as this one, in which monetary damages are not awarded to the prevailing party.

The outstanding fact of this case is that before the lawsuit, the students were not allowed to meet by the school district; after the lawsuit, the school district can no longer deny them the right to meet, on the particular facts in this case. Therefore, the plaintiffs are clearly the prevailing party for purposes of Section 1988. Plaintiffs were "essentially successful" in their claim that under the First Amendment they could not be barred from engaging in religious speech on the public school campus when the school district's sole justification for its refusal to allow them to meet was the Establishment Clause. *See, Hughes* v. *Repko*, 578 F. 2d 483, 487 (3rd Cir. 1978) ("a prevailing party on a particular claim is one who fairly can be found by the district court to have essentially succeeded on such claim").

This court has broad discretion to award attorneys' fees in a case in which it has entered a final judgment, even if the judgment is on appeal. *See, e.g., Brown* v. *Fairleigh Dickinson University*, 560 F. Supp. 391 (D. Del. 1983); *Terket* v. *Lund*, 623 F.2d 29 (7th Cir. 1980). As the Supreme Court has stated, "[r]egardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits." *White* v. *New Hampshire Department of Employment Security*, 455 U.S.

445, 448 (1982). Therefore, the fact that the merits of this case are on appeal should not affect the district court's consideration of the attorneys' fees issue.

To delay payment for attorneys' fees until every appeal is exhausted would not further the Congressional intent of ensuring effective access to the judicial process. This case has been in litigation sixteen months. To require plaintiffs' attorneys to continue to bear the cost of litigation without payment, particularly when the litigation is being prolonged by a defendant, is to place an unfair burden on plaintiffs' counsel. Such a burden may discourage other counsel from accepting similar civil rights suits in the future where the plaintiffs are unable to pay counsel.

* * * *

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

MEMORANDUM AND ORDER

[Filed Dec. 14, 1983]

On May 12, 1983, this court issued an Opinion and Order in the above-captioned matter. *See Bender v. Williamsport Area School District*, 563 F. Supp. 697 (M.D. Pa. 1983). The court granted the defendants' motion for summary judgment with respect to the plaintiffs' claim that their rights under the Free Exercise Clause were being violated. The court granted the plaintiffs' motion for summary judgment with respect to their free speech claim. One of the individual defendants has appealed that decision. *See* Notice of Appeal, Document 29 of the Record.

Presently before the court is a "Bill of Costs and Attorneys' Fees" filed by the plaintiffs. The defendants have objected to the petition, arguing *inter alia*, that the matter of costs and attorneys' fees should not be addressed until the Court of Appeals for the Third Circuit has decided the appeal from the May 12, 1983 decision. For the reasons set forth below, the court will hold the petition in abeyance pending a decision on the appeal.

DISCUSSION

The defendants do not suggest that the court lacks power to award fees and costs while the appeal is pending. It is clear that the pendency of an appeal on the merits of a case does not divest the district court of jurisdiction to act on a fee petition. *E.g.*, *West v. Keve*, No. 83-1085, slip op. at 9 n.5 (3d Cir., Nov. 9, 1983); *Brown v. Fairleigh Dickinson University*, 560 F. Supp. 391, 402 n.4 (D.N.J. 1983). While not contesting the court's jurisdiction, the defendants assert:

> Here, in a case which presents close questions of law, a timely appeal has been filed by one of the defendants. A reversal by the Court of Appeals of this Court's decision in favor of plaintiffs would, because of the nature of the declaratory and injunctive relief sought, inure to the benefit of all defendants, and would change plaintiffs' position from that of prevailing parties to that of losing parties not entitled to costs of any sort. In these circumstances, the defendants submit that this Court should refrain from awarding any costs until the Court of Appeals has made its decision.

Defendants' Objections to Plaintiffs' Bill of Costs and Attorneys' Fees at 3, Document 34 of the Record.

It has been suggested that district courts "should proceed with attorneys' fees motions, even after an appeal is filed, as expeditiously as possible. Any party dissatisfied with the court's ruling may then file an appeal and apply to [the circuit] court for consolidation with the pending appeal of the merits." *Terket v. Lund*, 623 F.2d 29, 34 (7th Cir. 1980) (footnote omitted); *accord*, *Obin v. District 9 of the Int'l Assoc. of Machinists & Aerospace Workers*, 651 F.2d 574, 583 (8th Cir. 1981). This rule encouraging expeditious dispositions of fee petitions is designed "to avoid delay and wasted effort" arising from piecemeal appeals. *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789, 793 (7th Cir. 1983).

While such "unitary" appeals may promote judicial economy in some cases, our Court of Appeals has observed that this is not universally true. In *West v. Keve*, *supra*, a recent case involving the question whether a dissatisfied party must appeal after resolution of the case in chief or may wait until the fee petition is decided, the Court of Appeals stated:

> Only where the appellate court is able to affirm both the decision on the merits and the fee award

> will a unitary appeal filed after the fee determination be both more cost-effective and convenient. If the fee award is based on a "prevailing party" standard, however, *see e.g.*, 42 U.S.C. § 1988, then an appellate court's reversal on the merits may well require a redetermination of the fee issue. In such cases, a unitary appeal saves no appellate court time because later the court may be required to review a new fee determination.
>
> But it is the district court that expends the most time and energy on the difficult process of evaluating fee petitions and conducting hearings on them. To permit the option of a unitary appeal, with the possibility of appellate reversal on the merits, exposes district judges to the necessity of conducting two separate time-consuming fee proceedings, both prior to and after the appeal. This is an inefficient use of judicial resources, already overtaxed.

West v. Keve, *supra*, slip op. at 8.

Inasmuch as the decision on the merits in the present case involved an extremely close question of law, the court believes that the fee petition should be held in abeyance pending the outcome of the appeal.[1] An appropriate Order will enter.

/s/ William J. Nealon
Chief Judge, Middle District
of Pennsylvania

DATED: December 14, 1983

---

[1] Plaintiffs urge the court to decide the fee petition without waiting for the outcome of the appeal, arguing that "[t]o delay payment . . . until every appeal is exhausted would not further the Congressional intent of ensuring effective access to the judicial process." Plaintiffs' Reply to Defendants' Objections at 3, Document 36 of the Record. The court does not hold, however, that adjudication of the petition must be delayed pending *every* appeal. Today's decision is concerned only with the appeal presently pending.

ORDER

In accordance with the reasoning set forth in the accompanying Memorandum, IT IS HEREBY ORDERED THAT the instant petition for costs and attorneys' fees shall be held in abeyance pending the outcome of the appeal presently before the Court of Appeals in the above-captioned matter.

/s/ William J. Nealon
Chief Judge, Middle District
of Pennsylvania

DATED: December 14, 1983

Law Offices

McCORMICK, REEDER, NICHOLS, SARNO,
BAHL & KNECHT
836 West Fourth Street
P.O. Box 677
Williamsport, Pennsylvania 17703

August 13, 1984

RE: Bender, et al v. The Williamsport
Area School District, et al
No. 82-9692, U.S. District Court

The Honorable William J. Nealon
Chief Judge
U.S. District Court for the
Middle District of Pennsylvania
U.S. Courthouse
Scranton, PA 18501

Dear Judge Nealon:

This will constitute a status report from the Defendants with respect to the above matter.

Subsequent to the receipt of the July 24, 1984 Opinion and Order of the Court of Appeals, we had intended to submit a supplemental brief on the Bill of Costs and Attorney's Fees issue. That issue is, of course, in abeyance as per your Honor's Order of December 14, 1983. We have learned, however, that counsel for Plaintiffs filed, on August 7, 1984, a Motion for Reconsideration by the Court en banc. It is now our intention to file the supplemental brief after the Court of Appeals either denies the Motion for Reconsideration or grants the Motion and then issues its opinion. We wish to so do in order to properly address the issue of whether Plaintiffs are a "prevailing party" under Rule 54(d).

If your Honor wishes us to proceed in any other manner, please so direct.

Very truly yours,

McCORMICK, REEDER, NICHOLS,
SARNO, BAHL & KNECHT

By /s/ David R. Bahl
DAVID R. BAHL

DRB:rc

cc: Gerald W. Seevers, Esquire

bcc: Dr. Oscar W. Knade
Nathan W. Stuart, Esquire
Mr. Thomas H. Miller

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[Title Omitted in Printing]

DEFENDANTS SUPPLEMENTAL BRIEF IN SUPPORT OF ITS OBJECTIONS TO PLAINTIFFS' BILL OF COSTS AND ATTORNEY'S FEES

I. PROCEDURAL HISTORY

Defendants refer to and adopt herein the procedural history contained in their Brief in Opposition to Plaintiffs' Reply to Defendant's Objections filed on or about September 21, 1983.

In addition thereto, the United States Court of Appeals for the Third Circuit issued its opinion dated July 24, 1984, a copy of which is attached hereto and marked Exhibit "A". Further, on August 15, 1984, the United States Court of Appeals for the Third Circuit denied plaintiffs' Motion for Rehearing by the Court en banc. A copy of that Order is attached hereto and marked as Exhibit "B".

II. STATEMENTS OF FACTS

Defendants refer to and adopt by reference the Statement of Facts contained in their Brief in Opposition to Plaintiffs' Reply to Defendants' Objections filed on or about September 21, 1983.

III. STATEMENT OF QUESTIONS INVOLVED

The initial issue raised in Defendants' Brief in Opposition to Plaintiffs' Reply to Defendants' Objections involved whether or not to await the disposition of the appeal to the Third Circuit Court of Appeals before ruling on plaintiffs' "bill of costs and attorney's fees." This issue is now mooted since the Court did indeed choose to await the disposition of the appeal to the Third Circuit Court of Appeals.

The second issue raised therein pertained to the propriety of the fee request made by the plaintiffs and is still a possible issue for resolution by the Court. The third issue raised therein involved the appropriate assessment of costs and, again, this issue is still before the Court.

The additional issue which is now presented, however, involves the effect of the decision of the United States Court of Appeals for the Third Circuit, Exhibit "A" hereto, on whether the plaintiffs are "prevailing parties" under Rule 54 of the Federal Rules of Civil Procedure and under 42 U.S.C. § 1988. It is the position of the defendants that the two decisions of the United States Court of Appeals for the Third Circuit attached hereto render the plaintiffs other than "prevailing parties" under the above stated rule and statute and, therefore, that the plaintiffs' "bill of costs and attorney's fees" request should be denied in full.

IV. ARGUMENT

On May 12, 1983, the United States District Court for the Middle District of Pennsylvania granted summary judgment to the plaintiffs on the grounds that "because the defendant school district is not constitutionally required to deny the plaintiffs the opportunity to meet, by doing so solely on constitutional grounds it has impermissibly burdened their free-speech rights." (Slip opinion, at page 4).

On July 24, 1984, the Court of Appeals for the Third Circuit issued its opinion reversing the District Court on the grounds that the Establishment Clause must prevail over free speech in a high school setting. "The facts of this case concededly present a close question. In sum, however, we conclude that the interest in protecting free speech within the context of the activity period as it exists at Williamsport Area High School is outweighed by the Establishment Clause concerns described earlier." (Exhibit "A", at page 47)

Finally, on August 15, 1984, the Court of Appeals for the Third Circuit denied plaintiffs' Motion for Rehearing stating "the petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied. Judges Gibbons and Weis would grant the petition for rehearing." (Exhibit "B", at page 2)

As a result of the two appellate decisions, the issue now presented is whether or not plaintiffs are "prevailing parties" for the purpose of receiving attorneys' fees and costs pursuant to the provisions of Rule 54 of the Federal Rules of Civil Procedure and 42 U.S.C. § 1988. It is defendants' position that plaintiffs are not "prevailing parties" because of the decisions by the Court of Appeals.

In this circuit, "a prevailing party on a particular claim is one who fairly can be found by the District Court to have essentially succeeded on such claim." *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978), at page 487. Based on the two decisions by the Court of Appeals, plaintiffs in this case have not "essentially succeeded" in their claims. A plaintiff who receives a favorable judgment on the District Court level, which decision is subsequently reversed at the appellate level cannot have succeeded, "essentially" or otherwise, and so cannot be a "prevailing party" for purposes of attorney's fees and costs.

The Court in *Luria Brothers and Company, Inc. v. Allen, et al.*, 672 F.2d 347 (3d Cir. 1982), was explicit in its determination that a plaintiff who won on the District Court level, but lost on appeal, was not a prevailing party entitled to attorney's fees. Luria Brothers

was a sublessee that brought a state claim and a § 1983 claim against a private landlord and received a judgment in its favor from the District Court. The Court also awarded attorneys' fees pursuant to § 1988. The Third Circuit affirmed the judgment on the state claim, but reversed the judgment on the § 1983 claim. On page 357, the *Luria* Court stated "it is clear that, by our adjudication today, Luria cannot be said to have prevailed in its § 1983 count." The Court then held "accordingly, the grant of attorneys' fees by the District Court will be reversed, not on the basis of an abuse of discretion, but solely because under our decision today Luria is the losing and not the prevailing party in the § 1983 claim." *Luria*, supra, at page 358.

This same rationale has been employed in other circuits as well. In *American Infra-Red Radiant Co. v. Lambert Industries, Inc.*, 41 F.R.D. 161 (D. Minn. 1966), at pages 162-163, the Court stated "it is clear as a general rule that reversal of a judgment vacates the taxation of costs which is included as a part of the judgment. In this case, there was reversal as to only one part of the judgment, but it seems logical to conclude that the entire apportionment of costs has been vacated when the relative extent to which the parties prevailed has been changed by the reversal. That such a result is necessary is implicit in the conclusion of the Court of Appeals that the original division of costs should be modified 'in view of the outcome' of the appeal."

In *Laje v. R. E. Thomason General Hospital*, 665 F. 2d 724 (5th Cir., 1982) at page 730, the Circuit Court reversed part of the District Court's decision and, accordingly, remanded the attorneys' fees award "so that the District Court may consider whether any modification of the award is required in light of the disposition of this appeal. In particular, the District Court should take into consideration the deletion of the portions of the award attributable to back pay, as well as the services rendered on the issues affirmed."

The Circuit Court in *Lowman v. Davies, et al.*, 704 F. 2d 1044 (8th Cir. 1983), reversed the decision of the District Court and stated, at page 1046, "the award of attorneys' fees must also be reversed. (Citation omitted). Lowman is no longer a 'prevailing party' within the meaning of the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988." In another Eighth Circuit case, *Harris v. Pirch*, 677 F. 2d 681 (8th Cir. 1982), the Circuit Court reversed the District Court and stated that the reversal negated the award of attorneys' fees and costs made by the lower Court. (page 689)

The case of *Doe v. Busbee*, 684 F. 2d 1375 (11th Cir. 1982), was somewhat different in terms of appellate review, but achieved basically the same determination of what constitutes a prevailing party. The District Court found in favor of the plaintiff, and defendant appealed. The Court of Appeals remanded the case to the District Court for re-trial. During the appellate process, the United States Supreme Court made various rulings in other cases that undermined the District Court's initial opinion; therefore, on remand, the District Court vacated the previous judgment and dismissed the Complaint. Thus, although the plaintiffs were successful in obtaining a preliminary injunction, a permanent injunction, and declaratory relief, "the plaintiffs ultimately did not prevail on a single legal issue in the case." *Doe*, supra at page 1381. The Circuit Court then stated "in view of the purpose behind the Attorney's Fees Award Act, we conclude that plaintiffs-appellees are not prevailing parties in this litigation. Their successes were merely temporary, and any benefit flowing from their successes in the District Court was awarded under a mistake of law." *Doe*, supra, at page 1381. See also *Jones v. Diamond*, 594 F. 2d 997 (5th Cir. 1979); *Brown v. American Enka Corporation*, 452 F.S. 154 (E.D. Tenn. 1976); and *Fleischer v. A.A.P., Inc.*, 36 F.R.D. 31 (S.D. New York 1964).

V. CONCLUSION

In light of the above-stated case law, as well as the two attached decisions of the Court of Appeals for the Third Circuit in the case at bar, plaintiffs are not "prevailing parties" under Rule 54 and § 1988 and, therefore, their "bill of costs and attorney's fees" request should be denied in full.

Respectfully submitted,

McCormick, Reeder, Nichols,
Sarno, Bahl & Knecht

By /s/ David R. Bahl
David R. Bahl
I.D. No. 10347
Attorney for Defendants

8503 Strand Court
Springfield, VA 22151

September 11, 1984

The Honorable William J. Nealon
Chief Judge
U.S. District Court for the
Middle District of Pennsylvania
U.S. Courthouse
Scranton, PA 18501

Re: *Bender, et al* v. *The Williamsport Area School District, et al*, No. 82-9692, U.S. District Court

Dear Judge Nealon:

This letter is in response to defendants' supplemental brief filed with the Court on August 29, 1984.

On August 28, 1984, the Court of Appeals for the Third Circuit issued an order staying the issuance of its mandate to November 13, 1984. The stay will be continued until final disposition by the United States Supreme Court, if a petition for a writ of certiorari is filed by November 13. Plaintiffs intend to file a petition for a writ of certiorari in the United States Supreme Court by that date. Also, it is plaintiffs' understanding that technically the order of this Court is still in effect pending the issuance of the formal mandate of the Court of Appeals.

Enclosed is a copy of the August 28, 1984, order of the Court of Appeals. Also enclosed are copies of the petition for rehearing and motion for stay of mandate filed with the Court of Appeals for your information.

Plaintiffs request that this Court take no further action on their petition for costs and attorneys' fees until final disposition by the Supreme Court. The reasons

given in the memorandum accompanying this Court's order of December 14, 1983, support this request, in the same way they supported defendants' request when the case was before the Court of Appeals.

If this request is denied, or if the petition for a writ of certiorari is denied, plaintiffs would then wish to address the issue of their status as "prevailing party" for purposes of costs and attorneys' fees in the action before this Court.

If your Honor wishes us to proceed in any other manner, please so direct.

Sincerely

/s/ Samuel E. Ericsson
SAMUEL E. ERICSSON

cc: David R. Bahl, Esq.

NOTICE OF APPEAL TO U.S. COURT OF APPEALS, THIRD CIRCUIT

[Title Omitted in Printing]

[Filed Jun. 10, 1983]

Notice is hereby given that John C. Youngman, Jr., one of the Defendants appeals to the United States Court of Appeals for the Third Circuit from [ ] Judgment [X] Order [ ] Other (Specify) of Judge Nealon (copy attached), entered in this action on May 12, 1983.

DATED: June 10, 1983

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ORDER

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

[Feb. 20, 1985]

February 19, 1985

Samuel Eric Hans Ericsson, Esquire
6901 Braddock Road
P.O. Box 1492
Springfield, Virginia 22151

Re: 84-773—Michael Bender, et al. v.
Williamsport School District, et al.

Dear Mr. Ericsson:

The Court today entered the following order in the above case:

> "The motion of National Association of Secondary School Principals for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is granted. Justice Powell took no part in the consideration or decision of this motion and this petition."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

I have been instructed to inform you that Rule 34.1(a) is satisfied by having the initial sheet in the brief state the "Questions Presented" without more. Counsel should not print on this page the title of the case or any other descriptive matter. A sample sheet is enclosed.

The additional docketing fee of $100.00, Rule 45(a), is now due and payable.

Very truly yours,

ALEXANDER L. STEVAS
Clerk

/s/ Sandy Nelsen
SANDY NELSEN
Assistant Clerk

Enclosures

Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-773

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioners,
v.
THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Establishment Clause requires the denial of equal access to a small, voluntary, student-initiated and student-led group wishing to meet for religious speech in a limited open forum created by a public high school.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-773

MICHAEL BENDER, *et al.*,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONERS

Petitioners, Michael Bender, et al., Williamsport Area High School students, who are members of Petros, an unincorporated association (hereinafter, collectively, "the students" or "Petros"), respectfully ask this Court to reverse the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (P. App. A) is reported at 741 F.2d 538. The opinion of the District Court (P. App. C) is reported at 563 F. Supp. 697.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1984. The court's order denying rehearing and suggestion of rehearing *en banc* (P. App. B), was entered on August 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The petition for a writ of certiorari was granted February 19, 1985.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Equal Access Act, 20 U.S.C. §§ 4071-74, enacted on August 11, 1984, is reprinted at Appendix E to the Petition.

STATEMENT OF THE CASE

A. The Facts

Williamsport Area High School ("Williamsport High") is a 2500-student secondary school which serves students in grades 9 through 12. J.A. 63.[1] Williamsport High draws students from about a 100 square mile area and is located on a 147 acre campus, more than a mile from the nearest residence. J.A. 63, 70-71. Consequently, the vast majority of the students arrive and leave the school by bus. J.A. 69. Students are to be in their homerooms at 7:45 AM for twelve minutes during which attendance is taken and announcements made. J.A. 102.

On Tuesday and Thursday mornings, the school has an extracurricular activity period which runs from 7:57 AM to 8:27 AM, immediately following homeroom. J.A. 66-68, 102-104. The purpose of the activity period is to accommodate those student activities that contribute "to the intellectual, physical, or social development of the students and [are] otherwise considered legal and constitutionally proper." P. App. A at 9a, quoting affidavit of Principal Wayne Newton. It is "a time during the day in

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[1] Citations to the record as reprinted in the joint appendix will be denoted as "J.A.". Citations to materials in the appendix accompanying the petition for a writ of certiorari will be denoted as "P.App.".

which students can take care of all extracurricular activities." J.A. 68 (Dep. of Principal Newton). On Tuesdays and Thursdays, classroom instruction does not begin until 8:31 AM. J.A. 68, 102-105.

During the activity period, students may choose to participate in any one of more than 25 activities, ranging from academic interests to recreational and social pursuits, or to form their own group.[2] Students also have the option of remaining in their homerooms, studying in the library, or visiting the computer station to receive career guidance and college preparation. *Id.*; P.App. A at 7-8a. Attendance at any of the activities is left to the individual student and is completely voluntary. P. App. A at 8a, 18-20a. The activity period is not tied to the formal curriculum of the school. P. App. A at 19a.

In September, 1981, three students, Lisa Bender, Morris Braggs, and Kerry Hunter, all seniors, asked Mr. Wayne Newton, the school principal, for permission for themselves and other interested students to meet during the activity period for Scripture reading, discussion, and prayer. Mr. Newton initially granted their request, but advised them that they could not use the public address system or bulletin boards to publicize the meeting. P. App. A at 6a; J.A. 142.

Forty-five students, or less than 2 percent of the student body, attended the first meeting of this group, later to be called "Petros". *Id.* A teacher opened the room, took attendance, and remained in the room grading

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[2] Student clubs which are currently active include: Student Government; Peer Helpers; Key Club; Class organizations; Business English Club; Future Homemakers of America; Vocational-technical Club; Spanish Club; Ecology Club; Speech and Drama Club; Office Aides; Band; Choir; Student Newspaper; Student Literary Art Magazine; and a Student Yearbook.

Other clubs which have been approved in the past and might be renewed if interest warranted are: Archery; Art; Audubon; Aviation; Bowling; Chemistry; Chess; Field, Forest and Stream; Future Nurses; Future Teachers; German; Poetry; Photography; and Ski Club. P.App. A at 8a n.8.

papers, but took no part in the meeting. P. App. A at 9-10a. The students read a few Bible verses without comment, and some students shared concerns for which they wanted prayer, and a few students prayed. J.A. 142-43. The school did not receive any complaints from anyone about the meeting. J.A. 76, 96.

At the second meeting of the group, Morris Braggs told the 20 students in attendance that Mr. Newton had decided Petros could not meet until he had obtained approval from the superintendent of schools and the school's attorney. Mr. Newton expressed concern to the students over the constitutionality of the meeting. J.A. 74. After a short prayer, the students immediately disbanded and returned to their homerooms. J.A. 143.

On October 1, 1981, the students wrote a letter to the school district superintendent expressing their disappointment at being barred from meeting. J.A. 54, 56. In response, the superintendent told them it would be "legally improper for a School District to approve or endorse such an activity on school district premises or on school time." J.A. 42 (letter of Superintendent Oscar Knade to Morris Braggs). He told them that they could not meet until the school's attorney had issued a written opinion on the matter. He asked the students to provide him with information about the proposed activity including information about faculty role, meeting times, and likely membership. *Id.* The students provided the superintendent with the requested information on October 23, 1981.[3]

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[3] The student proposal submitted at the superintendent's request reads as follows:

NAME OF THE ORGANIZATION

[Petros] (The Rock)

THE NATURE OF THE ORGANIZATION

The organization will be a non-denominational prayer fellowship. Participation will be voluntary and open to all students.

[Continued]

The following week, the school's attorney issued a written opinion which concluded that for the school to permit Petros to meet would violate the First Amendment. J.A. 39. On November 16, 1981, the school principal and the superintendent met with six Petros student representatives to explain the reasons based on the Constitution for banning their meeting. J.A. 39-40, 54. The students were not permitted to meet before or after school on campus. J.A. 75, 93.[4]

The students appealed to the school board. J.A. 47. On January 19, 1982, the school board approved the ban, again on advice of counsel. J.A. 48-49. Two days later,

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[3] [Continued]

PURPOSE OF THE ORGANIZATION

The purpose of the organization will be to promote spiritual growth and positive attitudes in the lives of its members.

LEADERSHIP

Selection of leaders will be by democratic election. The leaders will be responsible for directing the meetings and coordinating activities in a manner that will carry out the purpose of the organization.

MEETINGS

Regular meetings of the organization will be held on school premises during the Tuesday and Thursday morning activity periods. They will include Scripture reading, discussion, prayer and other activities which may be of interest to the group.

SUPERVISION

Meetings of the organization will be supervised by a faculty advisor. Student attendance may be verified by the signing of a roster.

P.App. A at 5-6a. There is no formal mechanism or procedure for applying to be allowed to meet during the activity period, other than oral and possibly written request as was done by the students. *Id.* at 8a n.8.

[4] An off-campus "released time" option was discussed. This was not feasible, however, in view of the 30-minute time allowed for the activity period and the school's isolated location (over one mile from the nearest residence), coupled with the fact that the vast majority of the students are bused and, therefore, have no independent transportation. J.A. 68-71.

the president of the board sent the students a letter denying their appeal, stating as the basis for the denial:

> The solicitor [has] advised the Board that to approve your proposal would be a violation of existing case law and therefore, an improper action. The Board decided, therefore, to deny your appeal.
>
> Please be assured that neither the School Board, nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.

J.A. 48-49.

According to Mr. Wayne Newton, the school principal since 1974, no group of students had ever been denied permission to meet during the activity period, except the students before this Court. P.App. A at 8a. The decision banning the students' meeting was made *solely* on the advice of the school district attorney that such a meeting would violate the Establishment Clause of the United States Constitution. P.App. A at 21a; J.A. 48-49.

There is no evidence that the school district has ever initiated or promoted a religious activity in the past. In the past, the school has offered elective courses in "Literature of Western Religions", although it was not offered in 1981-82. J.A. 87.

On June 3, 1982, ten student members of Petros and their parents brought suit against the school district, its administrators and the school board members in the United States District Court for the Middle District of Pennsylvania. The complaint alleged that denying them permission to meet violated their freedom of speech, free exercise of religion, freedom of association, and equal protection rights. Defendants' answer substantially admitted the facts in the complaint and relied on the Establishment Clause as their defense.

B. The Decision of the District Court

After discovery, the parties filed cross motions for summary judgment. Chief District Judge William Nealon

granted summary judgment to the students on their free speech claim and granted summary judgment to the school board on the free exercise of religion claim. In holding for the students, the court relied on *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and held that the school had denied the students the right to meet during the activity period, a limited open forum for students' speech, solely because their speech was religious. P. App. C at 102a.

The district court held that "*under the precise set of undisputed facts presented*", accommodating the students' speech would not violate the Establishment Clause. *Id.* (emphasis in original). Therefore, the school district had not demonstrated a compelling state interest to justify abridgment of the students' freedom of speech.

The district court held that the limited open forum had a self-evident secular purpose. *Id.* at 88a. Second, the primary effect of equal access would be the accommodation, not the advancement, of religion, given the "broad spectrum of student groups" meeting, as in *Widmar*. *Id.* at 90a. The district court found that high school students are mature enough to appreciate the neutrality of equal access, particularly absent the coercion which had existed in the "traditional school prayer cases." *Id.* at 97a. Third, no excessive entanglement was found "[i]nasmuch as the teacher would be present only to ensure orderly meetings" and "would be the functional equivalent of a policeman at a religious rally held in a public park." *Id.* at 99-100a.

Following the district court decision, the students met during the activity period for the 1983-84 school year. In letters exchanged between the attorneys for the students and the school district, the meetings were described as being student-initiated, student-led and orderly. P. App. D at 107a.[5] Members of the group discussed peer

[5] The subsequent conduct of the meetings in 1983-84 is not part of the record in the proceedings below. However, the continued accuracy of the factual findings of the district court regarding the

problems, school problems and home problems; some read Scripture and prayed. *Id.* A teacher sat at a table in a different part of the room from the students, graded papers and prepared lesson plans. *Id.* The meetings were held in a section of the cafeteria away from all other classrooms and students. *Id.* No students at the school believed that the meetings were "school-sponsored", and there was no divisiveness stemming from the meetings. *Id.*[6]

C. The Decision of the Court of Appeals

Defendant John Youngman appealed the district court's ruling on the students' free speech rights to the U.S. Court of Appeals for the Third Circuit.[7] On July 24,

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nature of the meetings in 1981 were not disputed by the court of appeals and can be accepted by this Court.

[6] *See also*, Taylor, "Student Prayer Group Sues for Right to Meet," *The New York Times*, August 7, 1984, at 8 ("But at the Williamsport high school, by all accounts there has been no hint of pressure for students to join Petros, which has both supporters and opponents in the Williamsport community, and nothing resembling official endorsement of religious activity.").

[7] The school board members were sued both in their official and individual capacities. After the parties filed their briefs on the merits in the court of appeals, Mr. Youngman's tenure on the school board ended. A petition for attorneys' fees under 42 U.S.C. 1988 is pending before the district court against Mr. Youngman and the other defendants.

Williamsport Area School District has continuously treated Mr. Youngman's appeal as its own. On October 10, 1984, the school district denied the students permission to meet for religious speech because of the Third Circuit decision. See P.App. D. In addition, on September 1, 1983, the school district entered a brief in opposition to the students' petition for attorneys' fees in excess of $20,000, under 42 U.S.C. 1988, on the grounds that the district court decision was on appeal to the Third Circuit and, if the decision were reversed, the students would not be the prevailing party. J.A. 146-48. On December 14, 1983, the district court ordered the fee petition held in abeyance pending the outcome of the appeal. J.A. 152-55. On August 29, 1984, the school district moved for dismissal of the students' petition for attorneys' fees before the district court, on the grounds that students were no longer the prevailing party in the district court after the court of appeals decision. J.A. 156-63.

1984, a divided panel of the Third Circuit reversed the district court holding on the basis of the Establishment Clause. It agreed with the district court's holding that, under *Widmar*, the defendants had violated the students' free speech right by excluding them from a limited public forum solely on the basis of the religious content of their speech. P. App. A at 20-21a.

However, the panel majority held that the Establishment Clause would be violated by allowing the students to meet. Although it agreed that the secular purpose of the forum was "manifest", *id.* at 23a, it held that accommodating the students' religious speech would have the primary effect of advancing religion and result in excessive entanglement. *Id.* at 32a, 35a.

The Third Circuit rejected the Establishment Clause analysis in *Widmar* as inapplicable to high school students. Having held that both the Free Speech Clause and Establishment Clause were violated, the panel believed it faced "a constitutional conflict of the highest order . . . . with no definitive guidance from the Court as to the proper direction to take." *Id.* at 36a. It held that the Establishment Clause outweighed the students' free speech rights. *Id.* at 41a.

Judge Adams dissented on the grounds that the majority opinion is inconsistent with *Widmar* v. *Vincent*. Specifically, Judge Adams wrote that the majority's "bright line rule—no prayer in public secondary schools" is a "wooden reading of the First Amendment" and "at variance with controlling precedent." *Id.* at 45-46a. Having refuted the majority's distinctions between *Widmar* and Williamsport, Judge Adams suggested that the majority's concern "stems not from the prospect of establishment of religion by the presence on the campus of Petros, but from the possibility of unconstitutional extensions of the Williamsport arrangement elsewhere", which "can be dealt with as they arise." *Id.* at 61a.

On August 15, 1984, with two judges dissenting, the Third Circuit denied the students' petition for rehearing

and request for rehearing *en banc*. On August 28, 1984, the Third Circuit issued a stay of mandate until November 13, 1984, pending the filing of the petition for a writ of certiorari. This Court granted the petition on February 19, 1985.

On September 20, 1984, the school turned down the students' request for permission to meet during the activity period for the 1984-85 school year on the same basis as the students had met the year before. On October 10, 1984, the school board again denied the students' request to meet. P.App. D.

On July 25, 1984, the United States House of Representatives passed the Equal Access Act by a vote of 337-77, which had passed the Senate on June 27, 1984, by a vote of 88-11. 20 U.S.C. §§ 4071-74. On August 11, 1984, President Reagan signed the Act into law, thereby prohibiting a public secondary school which has a limited open forum from denying equal access to students who wish to meet for "religious, political, philosophical, or other speech".

SUMMARY OF THE ARGUMENT

Williamsport Area School District believes the Constitution prohibits any accommodation of student-initiated and student-led religious speech on campus. Therefore, it has singled out the students before this Court for unique exclusion from an expressive forum created by a high school, solely because their speech is religious.

The analysis of this Court in *Widmar* prohibits such a prior restraint on extracurricular religious speech of high school students. By holding unconstitutional the accommodation of high school students' religious speech on an equal access basis, the court below has propounded a peculiar constitutional paradox. According to the court below, the Constitution *requires* public high schools to discriminate against religious speech, even though it *forbids* public universities from doing so. This result is inherently implausible.

The Establishment Clause does not require a prior restraint on these students' freedom of speech for several reasons. First, the Establishment Clause is a restraint on religious speech of the state and its agents; it is not, and must not become, a prohibition on religious speech of private individuals with their peers. The Establishment Clause decisions of this Court have required the prohibition of *state*-initiated, not *self*-initiated, religious speech.

Second, equal access for these students' religious speech is consistent with this Court's analysis in *Widmar* utilizing the tripartite test. Equal access for students' extracurricular religious speech is truly state neutrality toward, not state advancement of, the students' religious views. High school students are capable of correctly perceiving equal access as state neutrality rather than state endorsement, as decisions of this Court and the lower federal courts, Congressional findings, and the facts in this case demonstrate. Indeed, denial of equal access due to speculative and unsupported fears of students' misperceptions would build into society a serious distortion of the First Amendment.

Besides having a self-evident secular purpose, equal access avoids an excessive entanglement. If school officials are required to deny equal access to students engaging in religious speech, they will be forced to determine whether students' speech is or is not religious, an impossible task which invites lawsuits.

Finally, equal access for high school students' religious speech avoids an unnecessary conflict between the Free Speech Clause and the Establishment Clause. Several less restrictive alternatives exist for protecting high school students' religious speech without infringing upon the Establishment Clause.

If equal access is ruled unconstitutional, school officials will believe all students' individual religious expression must be stifled. Students whose personal conduct is otherwise exemplary may be disciplined solely for ex-

pressing their religious values and ideas at a time when other students are allowed to express themselves.

The Constitution does not require school officials to discriminatorily ban students' extracurricular religious speech. Instead, equal access is a fair and reasonable approach toward resolving the longstanding debate regarding religious activity on the public high school campus.

ARGUMENT

I. CONTENT-BASED DISCRIMINATION AGAINST THESE HIGH SCHOOL STUDENTS' RELIGIOUS SPEECH VIOLATES THEIR FREEDOM OF SPEECH.

A. The First Amendment protects religious speech by high school students.

High school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 506 (1969) (uphoiding free speech right of students to wear armbands protesting Vietnam War). As this Court emphasized in *Tinker*, "personal intercommunication among the students . . . is not only an inevitable part of the process of attending school; it is also an important part of the educational process." 393 U.S. at 512.

Following *Tinker*, the federal courts have vigilantly protected the free speech rights of high school students. *See, e.g., Fraser* v. *Bethel School District No. 403*, 755 F.2d 1356 (9th Cir. 1985) (student's sexually suggestive speech at school assembly protected by First Amendment); *Stanton* v. *Brunswick School District*, Civil No. 83-0464P (D. Me. Jan. 23, 1984) (student's choice of graphic description of person being executed as caption for her yearbook picture protected); *Fricke* v. *Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (homosexual escort to school senior dance is protected speech); *Gambino* v. *Fairfax County School Board*, 564 F.2d 157 (4th Cir. 1977) (contraceptive information in student newspaper

protected); *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D. N.Y. 1974), *aff'd mem.*, 515 F.2d 504 (2nd Cir. 1975) (same); *Dixon* v. *Beresh*, 361 F. Supp. 253 (E.D. Mich. 1973) (high school's denial of recognition to students' socialist political group unconstitutional); *Garvin* v. *Roseneau*, 455 F.2d 233 (6th Cir. 1972) (prohibition of high school Students Mobilization Committee raises substantial federal question); *Riseman* v. *School Committee*, 439 F.2d 148 (1st Cir. 1971) (students' distribution of political literature protected); *Scoville* v. *Board of Education*, 425 F.2d 10 (7th Cir. 1970), *cert. denied*, 400 U.S. 826 (1970) (student newspaper, *Grass High*, critical of school administration protected).

In this case, these students have requested permission to meet during the student activity period to read the Bible, pray, and discuss religious matters, in order to "promote spiritual growth and positive attitudes" in their own lives. *See supra* note 3. These students simply want to meet with other students who share similar values to encourage one another to stand firm in an environment that is not always conducive to those values. See J.A. 16, 18.[8] High school students individually must make critical moral decisions regarding the use of drugs,[9]

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[8] The time we spent in prayer and fellowship was a very uplifting time. It added to our day . . . knowing that other students were behind you in what you believed, and knowing that you could meet together to pray and ask God to help us to study and help us to learn the things that He would have us to learn.

Equal Access: A First Amendment Question: Hearings on S.815 and S.1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 44 (1983) (testimony of Ms. Lisa Bender); see *The New York Times*, *supra* note 6 (quoting Petros member Julie Harbot as saying, "It was a time to come together and be with each other, to help each other through problems at the school.").

[9] In 1984, 61.6 percent of high school seniors had used illicit drugs (excluding alcohol), including 45.8 percent who had used illicit drugs in the last year. L. Johnson and J. Backman, *Use of Licit and Illicit Drugs by America's High School Students*, prepared for U.S. Department of Health and Human Services, Na-

abuse of alcohol,[10] sexual conduct and related decisions,[11] honesty, respect for authority, and the value of their lives.[12]

Religious speech possesses the full protection of the Free Speech Clause. *Widmar* v. *Vincent*, 454 U.S. 263, 269 (1981); see *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 104 S. Ct. 2118, 2135 (1984) ("Jesus Saves" is as protected as political speech).[13]

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tional Institute on Drug Abuse, forthcoming (1985); see *New Jersey* v. *T.L.O.*, 105 S.Ct. 733 (1985).

[10] In 1984, 92.6 percent of high school seniors had used alcohol, including 67.2 percent in the last month and 4.8 percent daily in the last month. L. Johnson, *supra* note 9.

[11] In 1980-81, the pregnancy rate for 15- to 19-year-old women was 96 per 1,000, of which 45 would end in abortion. "U.S. Leads Developed Nations in Rate of Teen-Age Pregnancy, Abortion Rate Also Found Disproportionately High," *Education Week*, Mar. 20, 1985, at 1. See *Bellotti* v. *Baird*, 443 U.S. 622 (1979); *Carey* v. *Population Services International*, 431 U.S. 678 (1977); and *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

[12] In 1978, there were 263 suicide deaths per million persons between the ages of 15 and 19 years old, more than double the 1960 figure of 124. National Center for Health Statistics, *Vital Statistics of the United States: Mortality*, annual volumes; Table 5-12 (1960), Table I-8 (1978).

[13] A remarkable number of the key free speech cases have involved religious speech. *See, e.g., Fowler* v. *Rhode Island*, 345 U.S. 67 (1953) (religious speech in park); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (same); *Kunz* v. *New York*, 340 U.S. 290 (1951) (denunciation of religion on public streets); *Saia* v. *New York*, 334 U.S. 558 (1948) (amplification of religious speech in public park); *Marsh* v. *Alabama*, 326 U.S. 501 (1946) (religious solicitation in company town); *Tucker* v. *Texas*, 326 U.S. 517 (1946) (religious solicitation in government housing project); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) (religious solicitation); *Largent* v. *Texas*, 318 U.S. 418 (1943) (religious literature); *Jamison* v. *Texas*, 318 U.S. 413 (1943) (same); *Martin* v. *Struthers*, 319 U.S. 141 (1943) (same); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (religious solicitation); *Schneider* v. *State*, 308 U.S. 147 (1939) (religious literature); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938) (same); *see also, Heffron* v. *ISKCON*, 452 U.S. 640, 647 (1981) (religious speech protected by First Amendment);

This Court has never sanctioned discriminatory treatment of private religious speech, particularly a prior restraint on religious speech.

Students' religious expression is protected in the public high schools. *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943) (students' refusal to salute flag due to religious convictions protected by Free Speech Clause); see *Tinker*, 393 U.S. at 516 (Black, J., dissenting) (noting facts which indicate religious background of students' protest); *Bellotti*, 433 U.S. at 637 n.15 (*Tinker* officials were stifling discussion of political and moral issues).[14] Although school officials have "important, delicate, and highly discretionary functions", public schools "are educating the young for citizenship [which] is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637; see *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960) ("[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

McDaniel v. *Paty*, 435 U.S. 618, 626 (1978) (right to free exercise of religion includes religious speech); *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958) ("immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters").

[14] *See also*, Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983) [hereinafter cited as Yale Note]; Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 Geo. L.J. 135 (1983) [hereinafter cited as Georgetown Note]; Loewy, *School Prayer, Neutrality, and the Open Forum: Why We Don't Need a Constitutional Amendment*, 61 N.C.L. Rev. 141 (1982); Note, Widmar v. Vincent *and the Public Forum Doctrine: Time to Reconsider Public School Prayer*, 1984 Wis. L. Rev. 147 (1984) [hereinafter cited as Wisconsin Note].

B. High school officials discriminatorily have prohibited these students' speech solely because its content is religious.

As in *Widmar*, Williamsport High School officials refused to permit the students to meet during the student activity period solely because the content of their intended speech is religious. School officials mistakenly believed that neutral treatment of students' religious speech violated the Establishment Clause. P.App. A at 21-22a; P.App. C at 84a. These students are the only known group ever denied access to the student activity period. P.App. A at 18a; P.App. C at 81a.

As in *Widmar*, Williamsport High School has created a limited public forum by establishing the activity period in order to accommodate any student extracurricular activity that contributes to "the intellectual, physical, or social development of the students and is otherwise considered legal and constitutionally proper." P.App. A at 8-9a, 20a; P.App. C at 81a; see *Widmar*, 454 U.S. at 267. The activity period is "a time during the day in which students can take care of all extra-curricular activities." J.A. 68 (Dep. of Principal Newton). Over forty different student groups have taken advantage of the opportunity to meet during the activity period, including twenty-five different groups that currently meet. *See supra* note 2. As both courts below held, the students' religious speech falls within the scope of student activities permitted during the activity period, as defined by the school officials. P.App. A at 20a; P.App. C at 81a.[15]

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[15] Since the high school has established the activity period specifically for students' extracurricular expression, this Court is not deciding whether a public high school generally is a forum for student expression. *Cf., Tinker*, 393 U.S. at 511 (students' interpersonal communication protected from content-based discrimination on school campus); *ISKCON* v. *New Jersey Sports and Exposition Authority*, 691 F.2d 155, 160 (3rd Cir. 1981) ("[s]ince the exchange of ideas is an essential part of the educational process, but the need for discipline and order is great, a public high school is probably a limited forum also").

Content-based discrimination violates the Free Speech Clause. *Widmar*, 454 U.S. at 270; *Healy* v. *James*, 408 U.S. 169 (1972) (denial of recognition of controversial student group by university officials violates First Amendment); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972) (content-based prohibition on picketing outside public high school unconstitutional). As in *Widmar*, the school officials must demonstrate a compelling state interest to justify their content-based exclusion of these students from the activity period and demonstrate that the exclusion is narrowly drawn to achieve that compelling state interest. *Widmar*, 454 U.S. at 270; see *Tinker*, 393 U.S. at 511 (school officials specifically must show a constitutionally valid reason for prohibiting students' speech).[16] As in *Widmar*, the only compelling state interest asserted by the state is its belief that the Establishment Clause prohibits students from meeting for religious speech on the high school campus.

High school officials' discretion is not at issue in this case. The high school officials believed they had no discretion but were required by the Establishment Clause, as interpreted by the courts, to prohibit students' religious speech. P.App. C at 66a, 84a; J.A. 39, 48, 93. The school officials did not believe these students' meeting would disrupt the school environment. P.App. C at 83a; J.A. at 84-85, 97 (Dep. of Principal Newton and

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[16] Even if the Williamsport High School student activity period were not a limited public forum for student speech, the school's content-based exclusion of Petros from that period is permissible only if it is reasonably necessary to further legitimate state objectives. *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983); see *Widmar*, 454 U.S. at 280-81, (Stevens, J., concurring). The high school's sole reason for refusing access to Petros is the school's asserted interest in complying with the Establishment Clause. Thus, if the Establishment Clause does not require the exclusion of students' religious speech, the school's asserted justification cannot be a legitimate reason, much less a compelling state interest.

Superintendent Knade). Moreover, since the activity period is not tied to the school's formal curriculum, the school's power to prescribe an appropriate curriculum for its students is not at issue. P.App. A at 18-20; P.App. C at 84a; J.A. at 68; see *Widmar*, 454 U.S. at 276. The issue in this case is not school officials' discretion but whether the Establishment Clause requires a prior restraint on high school students' religious speech.

II. THE ESTABLISHMENT CLAUSE IS NOT VIOLATED BY ALLOWING EQUAL ACCESS TO A SMALL, VOLUNTARY, STUDENT-INITIATED AND STUDENT-LED GROUP WISHING TO MEET FOR RELIGIOUS SPEECH IN A LIMITED PUBLIC FORUM CREATED BY A PUBLIC HIGH SCHOOL.

A. The Establishment Clause restricts religious speech by the state, not religious speech by private citizens.

The Bill of Rights restricts governmental power in order to promote individual liberty. Spiritual liberty is the cornerstone of the First Amendment.[17] *By its very language*, the Establishment Clause restricts religious speech by the state, not religious speech by private citizens. Indeed, the Free Speech and Free Exercise of Religion Clauses explicitly protect religious speech by private citizens.[18]

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[17] Professor Archibald Cox has emphasized the primacy of spiritual liberty in the First Amendment order:

> The juxtaposition of the key phrases in the first amendment reveals much of the philosophy underpinning those guarantees of particular fundamental rights. The framers put freedom of conscience first, and then moved on to freedom of speech and the press. They were concerned above all else with spiritual liberty: freedom to think, to believe, and to worship.

A. Cox, *Freedom of Expression* 1 (1981).

[18] Contrary to *Widmar*, opponents of equal access often argue that the Establishment Clause requires special restrictions on private religious speech. They argue that religious speech will be "sullied" if allowed equal access to the marketplace of ideas and,

The court below erroneously applied the Establishment Clause beyond official state action to encompass the self-initiated, self-directed activities of private individuals with their peers in an expressive forum. The Establishment Clause was never intended to be a sword for discrimination against religious individuals, as it has become against these students. See *McDaniel* v. *Paty*, 435 U.S. at 641-42 (Brennan, J., concurring).

As the district court found, this case is "fundamentally different from the traditional school prayer cases." P.App. C at 96a.[19] A distinction of a constitutional dimension exists between a state-initiated religious activity in which students may choose to participate and a self-initiated, self-directed religious activity, which a school merely allows under a neutral policy of equal access for students to meet to discuss their various interests. P.App. A at 61a (Adams, J., dissenting); *cf.*, *Marsh* v. *Chambers*, 103 S. Ct. 3330, 3346 (1983) (Brennan, J., dissenting) ("We are certainly not faced with the right of legislators to form voluntary groups for prayer or worship . . . Rather, we are faced here with the regularized practice of conducting official prayers, on behalf of the entire legislature, as part of the order of business, constituting the formal opening of every single session of the legislative term.").

Specifically, this Court has found an Establishment Clause violation involving religious activity in the public

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therefore, must be specially "protected". Well-intentioned or not, such "protection" is censorship. Individuals engaging in religious speech can determine for themselves whether public expression of their views devalues their beliefs. The state has neither the constitutional authority nor the wisdom to make that determination for them.

[19] See *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d 971, 975 (2nd Cir. 1980) (recognizing that students' request for extracurricular prayer group "raises a different problem" from "state statutes or regulations *supporting* religious activity" in *Schempp* and *McCollum*).

schools, when the state has initiated a devotional religious activity as part of the school curriculum.[20] This Court has never held unconstitutional student-initiated, student-led extracurricular religious speech. The First Amendment does not allow the state to require religious speech by high school students, but neither does it allow the state to prohibit high school students' extracurricular religious speech.[21]

Although the court below relied heavily on *McCollum*, equal access for these students' religious speech is significantly different from the *McCollum* program, in which outside religious teachers were given special access to the classroom by school officials specifically to inculcate religious beliefs as part of the school curriculum. First, unlike these students' religious speech, the religious classes in *McCollum* were *state-initiated* religious indoctrination that "clearly raised the spector of government-endorsed and even government-coerced religious activity." P.App. A at 58a (Adams, J., dissenting). This

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[20] See *Jaffree* v. *Wallace*, 705 F.2d 1526 (11th Cir. 1983), *summarily aff'd in relevant part*, 104 S. Ct. 1704 (1984) (state-composed or state-led prayer); *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (state statute and local regulations established prayer led by state-solicited student "volunteers" in classroom in daily opening exercises); *Stone v. Graham*, 449 U.S. 39 (1980) (state statute requiring posting of the Ten Commandments on public classroom walls); *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963) (state laws requiring daily Bible reading and recitation of the Lord's Prayer in public classrooms); *Engel v. Vitale*, 370 U.S. 421 (1962) (recitation of a state-composed prayer in public classrooms required by statute); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) (school officials pursuant to state statute invited only religious outsiders to conduct religious classes as part of the school curriculum).

[21] *Compare Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (state violates the First Amendment if it requires that persons affirm belief in God in order to hold public office) *with McDaniel* v. *Paty*, 435 U.S. 618 (1978) (Establishment Clause does not justify state constitutional prohibition on participation in public office by religious persons).

Court emphasized "the close cooperation between the school authorities and the religious council in promoting religious education", 333 U.S. at 209, which is "clearly not the case here." P.App. A at 58a (Adams, J., dissenting); see P.App. at 28a (unlike Williamsport, *McCollum* school district had "no valid secular purpose in providing classrooms for religious instruction").

Second, unlike these students' religious speech, the *McCollum* religious classes were religious inculcation by the state as part of its *curriculum*. As this Court observed, the *McCollum* students were released from their legal duty of secular education "upon the condition that they attend the religious classes". *McCollum*, 333 U.S. at 210. Again, the few students who did not choose to participate in religious indoctrination had but one choice: They could conspicuously leave the classroom to attend a study hall. As the court below recognized. "unlike compulsory instructional classes, which are created and designed by the school authorities, the very existence of such organizations [at Williamsport Area High School] depends entirely upon voluntary student participation and interest." P.App. A at 18a.

Third, unlike equal access for these students' religious speech, *McCollum* was a case of *special* access for religious outsiders. In *Widmar*, this Court specifically distinguished *McCollum* from an equal access case:

> Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. *See, e.g., McCollum* v. *Board of Education*, 333 U.S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

454 U.S. at 272 n. 10. The benefit of the activity period in this case is not limited to religion, unlike the instruction period in *McCollum*, but is extended to a broad range of interests, as in *Widmar*. P.App. A at 28a.

Although school administrators must be diligent to ensure their neutrality in religious matters, as a result of legal counsel, Williamsport school officials have gone beyond policing official state speech to policing students' extracurricular speech. The decisions of this Court have not required, nor have they sanctioned, such censorship in the name of the Establishment Clause. See *Widmar*, 454 U.S. at 273.

B. Equal access for these high school students' extracurricular religious speech is consistent with the tripartite test.

1. *The high school has a secular purpose in allowing students to meet during the activity period.*

As the district court correctly noted, "the question is not whether an individual's activity can be characterized as having a religious purpose. Rather, the focus is whether the government policy which *allows* the activity has a secular purpose." P.App. C at 86a, *citing Widmar*, 454 U.S. at 271 (emphasis in original). Furthermore, a non-secular purpose will not be inferred lightly. *Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1362-63 (1984).

For many years, Williamsport Area High School has had an activity period for the purpose of allowing student groups which "promote the intellectual, physical and social development of its students" to meet. P.App. C at 87a. As both courts below agreed, there is no indication that the Williamsport Area School District created the activity period for anything other than valid educational purposes. P.App. A at 23a; P.App. C at 87a. Indeed, this litigation belies any notion that the Williamsport Area School District created the activity period for a nonsecular purpose. *Id.*

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[22] Thus, this case is distinguishable from a case in which adoption of an equal access policy by a school district with a past history of questionable practices was suspect. See *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d

2. *Equal access for these students' religious speech is a neutral accommodation of religion that does not have the primary effect of advancing religion.*

In *Widmar*, this Court held that equal access for a religious student group to a limited public forum created by a state university does not have the primary effect of advancing religion. 454 U.S. at 273. Applying the *Widmar* analysis to the facts of this case, the district court below found that allowing these students to meet for religious speech would be a neutral accommodation of religion and would not have the primary effect of advancing religion. The district court concluded:

> [Petros] seeks the administration's passive acquiescence—leaving them to pray and discuss matters that concern the religious aspect of their lives. In essence, these students want the government passively to acknowledge that they have religious interests, just as others are 'benefitting' from the government's recognition that they are interested in sports, journalism or the theater. By recognizing that students have these religious interests, the school would not be 'advancing' religion in the Establishment Clause sense, for the Constitution itself recognizes the existence of such interests. *Any advancement of religion would come from the students themselves, and this the Establishment Clause does not bar, it being a limitation on government conduct rather than on individual activity.*

P.App. C at 91a (emphasis added).

a. *Williamsport Area High School cannot reasonably be perceived as promoting these students' religious speech, since the activity period is available to a broad spectrum of student groups and school administrators are neutral in the students' choices of activities.*

This Court has repeatedly held that a state policy that neutrally treats religious and nonreligious persons in the

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1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983). P.App. C at 87a.

same manner does not have the primary effect of advancing religion. See *Widmar*, 454 U.S. at 274 (equal access to limited forum created by university does not have primary effect of advancing religion, because forum is open "to a broad class of nonreligious as well as religious speakers."); *Mueller* v. *Allen*, 103 S.Ct. at 3062, 3069 (1983) ("a program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."); *see also*, *Wolman* v. *Walter*, 433 U.S. 229, 242 (1977); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Walz* v. *Tax Commission*, 397 U.S. 664 (1969); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *cf. McDaniel* v. *Paty*, 435 U.S. 618 (1978) (Establishment Clause does not justify discriminatory treatment of religious persons).[23]

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[23] Since *Widmar*, several lower courts have applied its analysis to find no primary effect of advancement of religion where a state policy allows access to religious and nonreligious speakers. *See, e.g.*, *McCreary* v. *Stone*, 739 F.2d 716 (2nd Cir. 1984) (Establishment Clause does not require denial of equal access to public park to citizen group for religious symbolic speech), *aff'd by an equally divided court*, 53 U.S.L.W. 4431 (U.S. Mar. 27, 1985); *Clergy and Laity Concerned* v. *Chicago Board of Education*, 586 F. Supp. 1408 (N.D. Ill. 1984) (denial of equal access to outside religious group wishing to discuss legal alternatives to military service, when outside military group allowed on campus during school hours, held unconstitutional); *Berkshire Cablevision of Rhode Island, Inc.* v. *Burke*, 571 F. Supp. 976 (D.R.I. 1983) (state regulation requiring cable television operator to construct an institutional network for programming at institutions, including religious institutions and parochial schools, does not have primary effect of advancing religion); *Country Hills Christian Church* v. *Unified School District No. 512*, 560 F. Supp. 1207 (D. Kan. 1983) (religious community group cannot be denied equal access to school facilities once school district created a public forum for use of the facilities during nonschool hours by community groups); *Civil Liberties Union of Mass.* v. *School Committee*, Civil No. 15281 (Mass. Dist. Ct., Sept. 4, 1984) (same).

In addition to the district court below, some courts have indicated that equal access for religious student groups does not have the primary effect of advancing religion. See *Amidei* v. *Spring Branch Independent School District*, No. H-84-4673 (S.D. Tex. April 26,

As in *Widmar*, equal access for these students' religious speech does not have a primary effect of advancing religion. P.App. A at 46a (Adams, J., dissenting) ("I do not believe that Petros can be meaningfully distinguished from the student religious group permitted to meet in a public university by *Widmar*."). The availability of a limited forum to a broad class of nonreligious as well as religious speakers is an important indication of primary secular effect for two reasons.

First, a broad class of speakers indicates that the state is not endorsing the views of a particular group, since it generally allows a large number of groups with diverse

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1985) (Equal Access Act held constitutional); *Nartowicz* v. *Clayton County School District*, 736 F.2d 646, 649 (11th Cir. 1984) (in affirming preliminary injunction prohibiting school district from allowing equal access for religious student group, dicta suggests equal access may be permissible if "the school district merely accommodates, as opposed to endorses" the students' religious speech.); *Bell* v. *Little Axe Independent School District No. 70*, No. CIV-81-620-T (W.D. Okla. Mar. 14, 1983), *appeal docketed*, No. 83-1458, 83-1493 (10th Cir. April 5, 1983), *argued*, Sept. 10, 1984 (school district policy allowing equal access upheld if meetings held after and not before classes); *Harrisburg Chapter of the ACLU* v. *Scanlon*, No. 1181 C.D. 1981 (Pa. Commw. Ct. July 30, 1982) (relying on *Widmar*, court refused to enter consent decree in which school districts agreed to prohibit equal access for religious student meetings), *aff'd on procedural grounds*, 458 A.2d 1352 (Pa. 1983); *Reed* v. *Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (in a pre-*Widmar* decision, voluntary student meetings for prayer before classes began held constitutional). *But see*, *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038, *cert. denied*, 459 U.S. 1155 (1983) (equal access policy adopted by school district with past history of unconstitutional religious practices unconstitutional); *Brandon* v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123, *reh'g. denied*, 455 U.S. 983 (1982) (under faulty pre-*Widmar* analysis, equal access held unconstitutional *per se*, since religious speech not fully protected by First Amendment); *Johnson* v. *Huntington Beach Union High School District*, 68 Cal. App. 3d 1, 137 Cal.Rptr. 43 (Cal. Ct. App.), *cert. denied*, 434 U.S. 887 (1977) (same); *Trietley* v. *Board of Education*, 65 A.D. 2d 1, 409 N.Y.S. 2d 912 (N.Y. App. Div. 1978) (Establishment Clause violated).

interests to meet in its facilities. This is particularly true where the limited forum is open to all groups which wish to meet, as the Williamsport High School activity period is open to all student groups. Any student activity can meet that contributes "to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper." P.App. A at 9a; J.A. 65, 67, 90, 103. As a result, more than twenty-five student organizations currently meet during the activity period; fifteen past groups could be reactivated; and the potential number of groups is limited only by the number of students who wish to exercise the option of forming a group. P.App. A at 8a; P.App. C at 81a, 91a. The high school has never denied any other student group permission to meet. *Id.*

Second, the availability strongly indicates that the individual's decision to associate with religious speakers rather than nonreligious speakers is truly voluntary and uncoerced by the state. See *Mueller*, 103 S. Ct. at 3069 (where "aid to parochial schools is available only as a result of *decisions of individual parents* 'no imprimatur of state approval', *Widmar* at 274, can be deemed to have been conferred on any particular religion, or on religion generally") (emphasis added). Both courts below repeatedly emphasized both the complete voluntariness of the students' decisions to participate in any of a broad range of activities and the neutrality of school officials in the students' selection of activities. P.App. A at 8a, 18-20a; P.App. C at 96a. A student religious group in this case exists *only* if individual students, acting completely at their own discretion, decide to form such a group. *Id.* Before every activity period, each student decides which activity, if any, to attend that particular day and must leave the homeroom to go to the activity. P.App. A at 55a (Adams, J., dissenting).

Thus, as in *Widmar*, the reasonable inference is that the high school does not endorse these students' religious

speech. The activity period is available to a broad class of speakers, a few of whom engage in religious speech. Equally important, the number of groups indicates, and the record confirms, that the decision of each student to attend a particular group, or not to attend any group, is made without interference from school authorities.[24]

b. *High school students are capable of accurately perceiving equal access for students' religious speech as state neutrality.*

The court below held that these students' free speech right to meet during the activity period was outweighed by the Establishment Clause solely because the limited open forum was created by a public high school rather than a public college. The court below seemed to concede that, in reality, equal access for these students' religious speech would be merely neutral accommodation of their speech and not state advancement. Nonetheless, the court held, as a matter of law, that high school students are incapable of correctly perceiving equal access as neutrality. P.App. A at 25a (high school students are incapable of understanding "*the fact* that permission for Petros to meet would be granted out of a spirit of neutrality toward religion and not advancement") (emphasis added).

In so holding, the court below failed to understand correctly the real issue regarding high school students' perception of equal access for religious speech. The issue is *not* whether misperception of state endorsement is "possible" (P.App. A at 26a), but whether misperception is "reasonable". *Widmar*, 454 U.S. at 274 n.14. On the facts in this case, such a misperception is not reasonable. *See*

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[24] There is no empirical evidence that religious groups will dominate the activity period if an equal access policy is implemented. See *Widmar*, 454 U.S. at 275 (empirical evidence of domination of a forum by religious groups might cause an equal access policy to have a primary religious effect). Less than two percent of the student body has ever attended a Petros meeting.

supra pp. 23-27.[25] The issue is *not* whether high school students are as mature as college students or adults, but whether they are capable of understanding that equal access for religious speech is state neutrality, not state endorsement. High school students are capable of correctly perceiving state neutrality. *See infra* pp. 29-33. The issue is *not* whether a misperception by some unidentified students might possibly occur, but whether correction of that misperception can be achieved by means less drastic than an absolute prior restraint on these students' religious speech. Adequate means of correcting any misperception exist. *See infra* pp. 42-43.

Before placing a prior restraint on these students' free speech rights, the state must demonstrate that high school students are incapable of drawing the reasonable inference that equal access is state neutrality toward religion. Conclusory statements that high school students are incapable of making such a distinction contradict the concrete evidence to the contrary found in: 1) previous decisions of this Court and lower federal courts affirming the ability of high school students to make such distinctions; 2) Congressional findings of fact in support of the Equal Access Act; and 3) the facts in this case.[26] Since

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[25] In the cases in which this Court has found that school officials have not acted neutrally but have promoted religion, the students' perception of state endorsement has been not only reasonable but accurate. *See supra* note 20. This Court has never held that a speculative, *inaccurate* perception of *private* religious speech as state speech justifies a prior restraint. Loewy, *supra* note 14, at 146-47 (student perception legitimate concern in school prayer cases but not in equal access cases); Wisconsin Note, *supra* note 14, at 184 (same).

[26] See *Country Hills Christian Church*, 560 F. Supp. at 1216 (rejecting as "speculative" and unsupported by empirical evidence school district's argument that students will misperceive equal access); *McCreary* v. *Stone*, 739 F.2d at 727 (insubstantial testimony to support different primary effect test for children than adults).

public perception of constitutional rights is often molded by the federal courts, if allowed to stand, the decision below may prove to be a self-fulfilling prophecy.

1) *Federal court decisions.* High school students are able to hear other students' controversial expression without misperceiving school endorsement. *See generally, Tinker,* 393 U.S. at 511 (students on campus are not "closed-circuit recipients of only that which the State chooses to communicate"). Students will not misperceive fellow students' refusal to salute the flag, due to religious convictions, as school endorsement of their religious or political views. *See generally, West Virginia Board of Education* v. *Barnette,* 311 U.S. 624 (1943). Students are capable of understanding that the study of the Bible as history or literature in public school courses does not imply state endorsement of its religious teachings. *Schempp,* 374 U.S. at 225 (1963). Nor does the accommodation of released time programs for religious instruction during the school day signal to students state approval of religion. *Zorach* v. *Clauson,* 343 U.S. 306, 311 (1952). This Court has also upheld the availability to students of controversial materials in the school library with which the school board does not agree. *Board of Education* v. *Pico,* 457 U.S. 853 (1982) (Brennan, J., for the plurality).

Since students are presumed capable of understanding that the objective teaching of the Bible as part of the curriculum does not signify state endorsement of its religious teachings (*Schempp*), that the adjustment of the school schedule to allow students to receive religious instruction does not signify state endorsement of that instruction (*Zorach*), or that the school's purchase and placement of controversial materials on the school library shelves does not signify state endorsement of their content (*Pico*), then high school students should be presumed able to correctly perceive equal access for a student reli-

gious group as state neutrality toward, not state endorsement of, their views.[27]

This Court has given high school students, indeed students below the high school level, the power to make life-changing decisions without state, or even parental, interference. See *Bellotti* v. *Baird*, 443 U.S. 622 (1979) (a mature minor generally may decide to have surgery to terminate her unborn child's life without parental notification or state consent); *Carey* v. *Population Services International*, 431 U.S. 678 (1977) (statutory prohibition on sale of contraceptives to minors unconstitutional); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976) (statute giving absolute parental veto in minor's decision to have abortion unconstitutional).[28] In addition, many high school students possess the franchise, a nationally important political power. U.S. Const. Amend. XXVI.

The lower federal courts consistently have recognized high school students' ability to hear controversial views

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[27] The Court has not distinguished between speech taking place during curricular instruction and speech occurring during extracurricular time. See *Tinker* (wearing of armbands protected during curricular and extracurricular parts of school day); *Schempp* (curricular instruction regarding Bible); *Zorach* (released time during school day); *Barnette* (flag salute part of school curriculum). Furthermore, these decisions have involved students below high school age. See *Pico* (junior and senior high); *Tinker* (elementary, junior and senior high); *Schempp* (elementary and secondary students); *Zorach* (elementary and secondary students); *Barnette* (elementary and secondary students).

[28] Students have noted the irony of being able to make such drastic decisions while being barred from talking about religious matters:

> [High school students] really make a lot of decisions. I can decide if I want an abortion, or if I want to use contraceptives, but I can't decide if I want to come to a meeting to talk about religious matters before or after school. To me this just isn't fair.

Hearings, supra note 8 at 38 (testimony of Ms. Bonnie Bailey).

without perceiving school endorsement, whether expressed by students in school newspapers,[29] school assemblies,[30] or student groups,[31] by teachers in the classroom,[32] or by materials in the school curriculum.[33] The federal courts have found high school students to be "surprisingly sophisticated, intelligent, and discerning." *Wilson* v. *Chancellor*, 418 F. Supp. 1358, 1368 (D. Or. 1976).[34]

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[29] *See, e.g., Gambino* v. *Fairfax County School Board*, 564 F.2d 157 (4th Cir. 1977) (school cannot prohibit contraceptive information in student newspaper funded and sponsored by school); *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 504 (2nd Cir. 1975) (same).

[30] *See, e.g., Fraser* v. *Bethel School Dist.*, 755 F.2d 1356, 1363 (student's sexually suggestive speech at school assembly protected).

[31] See *Dixon* v. *Beresh*, 361 F. Supp. 253 (E.D. Mich. 1973) (to deny recognition to student socialist group "for the reason that it advocates 'controversial' ideas is patently unconstitutional").

[32] *See, e.g., James* v. *Board of Education*, 461 F.2d 566, 568, 573-74 (2nd Cir.), *cert. denied*, 409 U.S. 1042 (1972) (high school students are able to distinguish between the official views of the school board and a teacher's wearing of an armband in class "as an expression of [his] *religious* aversion to war") (emphasis added); *Russo* v. *Central School District No. 1*, 469 F.2d 623, 633 (2nd Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (high school students can understand that teacher's refusal to salute the flag reflects her personal views not those of the school); *cf., National Gay Task Force* v. *Board of Education*, 729 F.2d 1270 (10th Cir. 1984) (teachers' speech advocating homosexual activity protected unless normal school activities are materially or substantially disrupted), *aff'd by an equally divided court*, 53 U.S.L.W. 4408 (U.S. Mar. 26, 1985).

[33] *See, e.g., Grove* v. *Mead School District No. 354*, 753 F.2d 1528, 1540-41 (9th Cir. 1985) (Canby, J., concurring) (curricular material containing passages referring negatively or profanely to Jesus Christ does not convey governmental endorsement of those religious views).

[34] In ruling that a teacher's guest to speak in support of Communism must be allowed access to political science class, the court in *Wilson* noted that high school students "are far from easy prey for even the most forcefully expressed, cogent, and persuasive words." 418 F. Supp. at 1368. *See also, Seyfried* v. *Walton*, 668 F.2d 214,

High school students are exposed repeatedly to controversial ideas both in and out of school, and "are beyond the point of being sheltered from the potpourri of sights and sounds we encounter at every turn in our daily lives". *Fraser*, 755 F.2d at 1363. Indeed, the federal courts have been acutely aware of the fact that high school students are very near, if not past, the age of legal adulthood.[35]

The courts send a confusing and contradictory signal. High school students are presumed able to distinguish other students' controversial expression, and even controversial curricular and teachers' classroom expression, from state endorsed speech. Inconsistently, however, the court below held as a matter of law that high school students are not able to distinguish other students' extracurricular religious speech from state endorsed speech. See Yale Note, *supra* note 14, at 504-505 ("view of the high school student adopted by the courts in religious cases conflicts directly with the position taken when nonreligious forms of First Amendment activity are at issue").[36]

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219 (3rd Cir. 1981) (Rosenn, J., concurring) ("the court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the later grades of secondary school"); *Koppell* v. *Levine*, 347 F. Supp. 456, 464 (E.D.N.Y. 1972) (recent "legislation, judicial decisions and evolving social attitudes" have altered traditional view of students' rights).

There is empirical psychological evidence supporting this presumption of the high school students' intellectual maturity. Several studies indicate that, by age 14-15, adolescents gain the sophisticated cognitive capacity necessary to form their own ideas, to disagree with the views of peers and authority figures, and to establish the personal ideals and values of self-identity. See Yale Note, *supra* note 14, at 507-509.

[35] As the Second Circuit concluded in *James*: "[i]t would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue." 461 F.2d at 574.

461 F.2d at 574.

[36] The Second Circuit's inconsistency in recognizing high school students' ability to separate *teachers'* classroom speech from school

Public high school officials must teach students, by word and deed, the meaning of the Bill of Rights. *Ambach* v. *Norwick*, 441 U.S. 68, 76-77 (1979). High school officials should not be required to perpetuate misperceptions and, thereby, build into society false notions about the First Amendment. They can teach tolerance and respect for student expression, including students' religious speech, as well as the correct functioning of the First Amendment, which limits state religious speech but protects the citizen's religious speech. The nation itself has a great deal at stake. "[I]f schools continue to teach students that religious speech is taboo, our country will reap a harvest of religious intolerance. Individuals raised on the notion that public religious speech is forbidden in schools will learn to apply that teaching and prohibit it in other areas." S. Rep. 98-357, 98th Cong., 2d Sess. 12 (1984). As Judge Adams concluded, "[w]hen the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, I believe the Constitution and the Nation are the better for it." P.App. A at 62a (Adams, J., dissenting).[37]

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endorsement in *James* and *Russo* while subsequently denying high school students' ability to separate *peers'* personal speech from school endorsement in *Brandon* has been noted by legal commentators. Loewy, *supra* note 14, at 146-47 (noting *Brandon* adopted Spartan view of educational process that has been rejected by this Court since *Meyer* v. *Nebraska*, 262 U.S. 390 (1923)); Wisconsin Note, *supra* note 14, at 185; Georgetown Note, *supra* note 14, at 148 n.102; Yale Note, *supra* note 14, at 503-505 (contradiction between *Brandon* and *James* is "particularly striking").

[37] In justifying its denial of these students' free speech, the court below concluded that it is "asking much" of high school students "to comprehend the subtleties and intricacies of the first amendment". P.App. A at 30a. If true, this is a tragic statement—that a proper understanding of the First Amendment is beyond the comprehension of the normal citizen. In the current debate over the legitimate purposes of public education, nearly universal consensus exists that a primary mission of education is to prepare students to participate wisely in the political process. Notably, the Pennsylvania

2) *Congressional findings.* Congress has weighed and rejected the argument that high school students will not understand that neutral treatment of a student religious group is not state endorsement of religion. The Senate Report on the Equal Access Act. 20 U.S.C.A. Sect. 4071-74, states: "[t]he Committee finds that students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other." S. Rep. 98-357 at 35; see *id.* at 9-10.[38] In so finding, the Committee heard the testimony of many witnesses, including constitutional lawyers[39] and high school students.[40] Based on the students' testimony, the Committee further found "that students

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legislature believes that high school students can and must be taught its proper functioning. 24 Pa. Cons. Stat. Sec. 15-1545 (1983) (requiring public schools to have a "Bill of Rights Week" "to instill into pupils' minds thereof [its] purpose, meaning and importance").

[38] See *Amidei* v. *Spring Branch Independent School District*, No. H-84-4673 (S.D.Tex. April 26, 1985) (bench ruling that Equal Access Act constitutionally protects equal access for high school students' religious group).

[39] For example, Professor Laurence Tribe testified by letter that *Widmar* should protect secondary school students' religious meetings "provided only that the student meetings at issue are not state-initiated, school-sponsored, or teacher-led. . . ." *Hearings, supra* note 8 at 19 (statement of Sen. Hatfield); see *Religious Speech Protection Act, Hearing on H.R. 4996 Before the Subcomm. on Elem., Sec. and Voc. Educ. of the House Comm. on Educ. and Labor*, 98th Cong., 2nd Sess. 46-52 (testimony of Laurence Tribe).

[40] For example, a high school student from Sonoma, California testified:

> They also have a smoking section in our school. Does that mean that the school sanctions, supports and encourages smoking? I doubt it, just because the school allows a group to meet, doesn't mean it approves of and supports their activities. The same should hold for religious groups.

Hearings, supra note 8 at 64 (testimony of Sarah Scanlon).

reasonably perceive the denial of access for religious speech as State hostility toward religion." *Id.* at 36; *see id.* at 10-12. Given the particular ability of the legislature to gather and analyze information, Congressional findings of fact are to be accorded substantial deference, even for the purpose of constitutional adjudication. *See, e.g., Rostker* v. *Goldberg*, 453 U.S. 57 (1981).

In passing the Act, by votes of 88-11 in the Senate and 337-77 in the House, Congress overwhelmingly affirmed its support of the *Widmar* decision and its application to the extracurricular religious speech of secondary school students.[41] In essence, Congress recognized that equal access is a reasonable and necessary attempt to resolve the longstanding debate regarding religious activity on the public school campus.[42]

3) *The facts in this case.* After carefully examining the facts of this case, District Court Chief Judge Nealon

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[41] *See, e.g.*, 130 *Cong. Rec.* S.8337 (daily ed. June 27, 1984) (statement of Sen. Hatfield); *id.* at S.8355 (statement of Sen. Levin); *id.* at S.8356 (statement of Sen. Bumpers); *id.* at S.8364 (statement of Sen. Thurmond); *see also, Student Coalition for Peace* v. *Lower Merion School Dist.*, No. 84-1017 (E.D. Pa. Jan. 31, 1985), *appeal docketed*, No. 85-1092 (3rd Cir.) (in the Equal Access Act "it was Congress' intent to expand the *application* of the Supreme Court's decision in *Widmar* to secondary schools").

[42] An ad hoc committee has formulated guidelines for school administrators for implementation of the Act. 130 *Cong. Rec.* H.12270 (daily ed. October 11, 1984) (statements of Rep. Bonker and Rep. Goodling). The ad hoc committee consisted of the following groups: Christian Legal Society, American Civil Liberties Union, American Association of School Administrators, National Education Association, National Association of Evangelicals, Baptist Joint Committee on Public Affairs, Americans for Democratic Action, and General Conference of Seventh-Day Adventists. Additional groups agreeing to the guidelines included: American Federation of Teachers, Catholic League for Religious and Civil Rights, Christian Educators Association, Freedom Council, National Association of Christian Educators, National Council of Churches of Christ in the U.S.A., and People for the American Way.

rejected "the notion that, under the circumstances of this case, high school students would perceive the 'open forum' policy as tacit endorsement by school officials of a club's religious activity." P.App. C at 93a. Those educational experts closest to the students have judged that high school students are capable of forming their own groups, which implies they can recognize that the groups formed reflect the students' interests and not necessarily the judgment of the school. P.App. A at 19a; *id.* at 49a (Adams, J., dissenting).[43] The principal believes that the students' maturity has increased in recent years. J.A. 81. The students' decisions to participate in any of a broad range of activities occurring during the activity period is completely voluntary, and school officials remain neutral in the students' selection of activities. P.App. A at 8a, 18-20a; P.App. C at 96a.

Furthermore, school officials had not received any complaints before they banned the students' speech. J.A. 76, 96. After a year of meeting at the school during 1983-84, there still is no evidence that students at Williamsport Area High School perceive allowing Petros to meet as official endorsement of religious activity.[44]

Finally, these students have gone the extra mile in their desire to avoid any appearance of state support for their religious beliefs. They have agreed to forego use of school media, to post a disclaimer, to meet in the school cafeteria rather than a classroom, and to have a non-teacher monitor or no monitor at all. *See infra* pp. 42-43. The students do not want any perception of state endorsement; they just want to meet.

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[43] In his deposition, Principal Newton testified that Williamsport High School students performed above average academically and on standardized tests measuring intelligence and students' needs and desires, i.e., maturity. J.A. 80-81, 94, 97-98.

[44] See *The New York Times, supra* note 6 ("But at the Williamsport High School, by all accounts there has been no hint of pressure for students to join Petros, which has both supporters and opponents in the Williamsport community, and nothing resembling official endorsement of religious activity.").

c. *The additional factors relied on by the Third Circuit are similarly invalid.*

As a result of its decision that high school students are legally incapable of perceiving that equal access for students' religious speech is state neutrality not state advancement of religion, the court below found that three factors would create a misperception of state endorsement of these students' speech. However, "the predicted effect of these institutional differences [between *Widmar* and Williamsport]—that the presence of Petros will be perceived as state endorsement of religion—represents uncorroborated speculation without any basis in the record." P.App. at 54a (Adams, J., dissenting).

(1) *Compulsory attendance laws.* Two issues underlie the discussion of compulsory attendance laws. Does the existence of such laws: 1) transform every form of speech on school property during hours of compulsory attendance into state-endorsed speech or 2) coerce students into attending these students' religious meeting? [45]

The court below held, in effect, that compulsory attendance laws transform all extracurricular student meetings into coercive activities. The issue of coercion again highlights the fundamental difference between equal access and the traditional school prayer cases—who is speaking. If the speaker is the state, then the compulsory attendance laws are providing a captive audience for state religious speech. However, if the speakers are students expressing a personal viewpoint, the courts have repeatedly recognized that high school students are capable of distinguishing between students' personal expression and state endorsement, even when the

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[45] A significant number of students at Williamsport Area High School are not required to attend school, since they are 17 years of age or older. 24 Pa. Stat. Ann. Sections 13-1326, 13-1327 (1983).

students' speech takes place during compulsory attendance time. *See supra* pp. 29-33.

Nor does the existence of compulsory attendance laws coerce students to attend Petros. The logic of this argument collapses under the weight of the facts, particularly the broad number of student groups and the voluntariness of their meetings. If merely allowing a religious student group to meet coerces non-participating students, then students must simultaneously also feel coerced to belong to Key Club, Future Homemakers of America, Ecology Club, or any of the other twenty-five student groups meeting during the activity period.

In addition, a student religious group would exist only if individual students, acting completely at their own discretion, decided to form a group. P.App. A at 8a, 18-20a ("unlike compulsory instructional classes, . . . the very existence of such organizations depends entirely upon voluntary student participation and interest"). Attendance at a group requires that the student make a conscious decision to leave homeroom and affirmatively choose to meet with a particular student group out of the wide range of activities available. As Judge Adams concluded, "[I]n view of the voluntariness of a student's decision to attend a specific activity, the fact of compulsory attendance is irrelevant." *Id.* at 55a; see *id.* at 45a.

(2) *The nonparticipatory presence of an adult monitor.* The court below agreed that school policy did not require teacher participation in a student group and that a teacher had not participated in the content of these students' religious meetings. P.App. A at 9a, 26-27a; P.App. D at 107a. Nonetheless, the court below held that the presence of any person, whether a school employee or a parent, would be perceived as state endorsement of that group's speech solely because the state gave administrative approval to that person to function as a monitor. *Id.* at 27a.

To the contrary, however, there is "no possibility that the monitor's presence . . . could be misconstrued as school endorsement of Petros." *Id.* at 56a (Adams, J., dissenting). The monitor is merely "the functional equivalent of a policeman at a religious rally held in a public park." P.App. C at 100a, *citing O'Hair* v. *Andrus*, 613 F.2d 931, 935 (D.C. Cir. 1979). The mere presence of a monitor whom the school has administratively approved does not communicate state endorsement of students' speech, particularly given that high school students can distinguish a teacher's classroom speech from state endorsed speech. *See supra* pp. 29-33.[46]

Teachers are capable of functioning solely as monitors to protect the physical safety of the students and school property. Teachers in public schools must walk a fine line every day in dealing with topics such as comparative religion, history, literature, philosophy, and science, which sometimes touch on religious values and issues. The law assumes a teacher can be neutral in a curricular setting. *Schempp*, 374 U.S. at 225 (teaching religion objectively); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) (teaching theory of origins); *Zorach*, 343 U.S. at 313 (teacher monitoring students' attendance at religious classes). The same teacher can be neutral in an extracurricular setting when functioning as a monitor.

(3) *Location of the forum.* The court below held that the students' meeting on school premises in itself would create the perception of school approval of the content of the students' speech, citing *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). However, as already noted, the court below recognized that controlling differences exist between *McCollum* and the self-initiated

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[46] Moreover, as Judge Adams noted below, "out of an abundance of caution" the court could require that "Petros meetings be monitored by a non-teacher." P.App. A at 56a. Indeed, the students are willing to meet without any monitor. P.App. C at 100a.

extracurricular religious activity in the present case. P.App. A at 28a; *see supra* pp. 20-21.[47]

3. *Equal access for these students' religious speech does not create an excessive entanglement between the state and religious institutions.*

The court below held that to allow Petros to meet would violate the excessive entanglement prong. It feared having to determine when students' speech is religious and when it is not, a legitimate fear which favors allowing these students to meet.[48] As this Court noted in *Widmar*, the school "would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech' " than by allowing a religious student group to meet. 454 U.S. at 272 n.11. Indeed, administrative discretion to determine whether citizens' speech is or is not religious is

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[47] The court below argued that these students' presence would be more obvious than that of the students in *Widmar*. P.App. A at 26a. The facts belie this argument: Petros has met in the school cafeteria away from the other classrooms; 98 percent of the student body are elsewhere than at the Petros meeting; and the students agreed to forego any use of school media. *See infra* pp. 42-43. Furthermore, in 1983, approximately 543, out of a total of 1481, public colleges, including community and four-year colleges, had enrollments of less than 2500 students. National Center for Education Statistics, U.S. Department of Education, *Digest of Education Statistics*, forthcoming (1985). The number of groups currently meeting during the activity period at Williamsport High (over 25 groups in a student body of 2500) is proportionately the same as the number meeting at the university in *Widmar* (over 100 groups in a student body of 11,000).

[48] Mistakenly, the court below suggested that excessive entanglement would result from the necessity of constantly interpreting Petros announcements to insure that no religiously oriented material would be communicated on the bulletin board, public address system, or the school newspaper. P.App. A at 33-34a. This is a misinterpretation of the students' simple, easily administered offer to forego completely the use of the school media. Thus, there is no need for the school to decide whether material is religiously oriented or not. *Id.* at 59a (Adams, J., dissenting).

unconstitutional. *Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1943).

Such determinations would create a "no-win" situation for high school officials. See *Country Hills Christian Church*, 560 F. Supp. at 1218 (specific examples of administrators' attempts to draw line between religious and nonreligious speech, resulting in excessive entanglement). Many student groups are arguably religious that do not read the Bible and do not pray during their meetings but, nonetheless, discuss ideas that have strong religious implications, including groups discussing philosophy, literature, peer problems, personal or societal values, or political action. School officials still would be subject to lawsuits. However, now the lawsuits would challenge school officials' determinations that certain groups denied permission to meet were religious or that certain groups permitted to meet were nonreligious.[49] Equal access avoids these constitutional and administrative difficulties.[50]

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[49] For example, in the Williamsport High School yearbook, several groups list activities that are arguably religious speech: singing sacred, Christmas and gospel music (J.A. 112-13, 131, 137-38); performing in churches (J.A. 140); and sponsoring Christmas festivities (J.A. 116, 130, 132). Also, the purpose of Peer Helpers, a group meeting during the activity period, is analogous to that of Petros—students assisting other students with the personal problems they face. See J.A. 66.

[50] The court mentions a fear that Petros would create divisiveness. P.App. A at 42a, 44-45a. Political divisiveness might be a legitimate concern if school officials were determining the religious content of a curricular activity, *e.g.*, the content of an opening classroom prayer. It is not a legitimate concern, but rather a "heckler's veto", when school officials are merely treating neutrally students' religious and nonreligious extracurricular speech. However, the student body has not been divided by allowing Petros to meet. *See supra* note 6.

Moreover, this Court recently held that no inquiry into potential divisiveness is called for when a direct subsidy to church-sponsored

III. THE THIRD CIRCUIT ERRED AS A MATTER OF LAW IN FAILING TO CONSIDER LESS RESTRICTIVE ALTERNATIVES TO AN ABSOLUTE BAN ON HIGH SCHOOL STUDENTS' RELIGIOUS SPEECH.

Traditional free speech analysis requires that, even if the state demonstrates a compelling state interest, any restriction on speech must nonetheless be narrowly drawn. *See, e.g., Widmar*, 454 U.S. at 270; *Perry Education Ass'n* v. *Perry Local Educator's Ass'n*, 460 U.S. at 46; *Police Department of Chicago* v. *Mosley*, 408 U.S. at 101. The court below required a prior restraint on the students' speech, without considering whether less restrictive alternatives, which had been proposed by the students, would satisfactorily meet its speculative Establishment Clause concerns.

A number of suitable alternatives exist. A simple disclaimer by the high school could affirmatively convey a message of state neutrality. See *Widmar*, 454 U.S. at 274 n.14 (university disclaimer of its name's use made reasonable inference of support less likely).[51] The dis-

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schools or colleges or other religious institutions is not involved. *Lynch* v. *Donnelly*, 104 S. Ct. at 1364-65, *citing Mueller*, 103 S. Ct. at 3071 n.11; P.App. A at 60a n.11 (Adams, J., dissenting).

[51] Additional speech is the preferred and required alternative to censorship. *See Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 97 (1977) (prohibition on commercial speech struck down since less restrictive alternative of counter-publicity equally effective); *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 87 (1980) (mistaken identification of particular speaker's views with those of property owner remedied by owner's public disclaimer); *McCreary* v. *Stone*, 739 F.2d at 728 (disclaimer protects Establishment Clause concerns), *citing Allen* v. *Morton*, 495 F.2d 65, 67 (D.C. Cir. 1973) (same); *U.S. Southwest Africa/Namibia Trade & Cultural Council* v. *United States*, 708 F.2d 760, 772 (D.C. Cir. 1983) (FAA ban on political advertisements in airport unjustified since disclaimers can correct misperception); *Koppell*, 347 F. Supp. at 460 (prior restraint on student magazine not justified since school could place disclaimer on each copy); Georgetown Note, *supra* note 14 at 156; Loewy, *supra* note 14 at 145.

claimer could appear in the school media or as a sign on the door of the room in which the students meet.

Similarly, education itself is a wholesome alternative to censorship. See *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). A short lesson in homeroom or social studies class on equal access and the First Amendment would dispel any misperception, as well as furthering the school's primary mission of preparing students to participate in the political process. *See supra* pp. 33.

As additional alternatives, the students offered to have a nonteacher monitor or no monitor, since school policy does not require that a faculty member act as advisor to a club. P.App. A at 56a (Adams, J., dissenting); P.App. C at 100a; J.A. 144. The students agreed to forego use of the school media to announce their meetings. P.App. A at 59a (Adams, J., dissenting); P.App. C at 96a. Finally, they have met in the cafeteria away from other groups' meetings. P.App. A at 56a (Adams, J., dissenting).

Besides failing to apply the less restrictive alternatives standard, the court below further departed from the traditional free speech analysis, committing three fundamental errors. It effectively placed the burden on the students to demonstrate that the Establishment Clause would not be violated rather than on the state to prove it would be violated. See *Widmar*, 454 U.S. at 269-70; *Healy* v. *James*, 408 U.S. at 184-85 (erroneous placement of burden of proof on students rather than college requires reversal); *Tinker*, 393 U.S. at 511 (school must make "specific showing of constitutionally valid reasons to regulate [student] speech"). This is particularly egregious when the facts solidly support the district court conclusion that the Establishment Clause would not be violated.

The court below also erroneously assumed that religious speech is less protected in a limited public forum created by a high school. P.App. A at 42a. This is contrary to *Widmar*, 454 U.S. at 269-70, and makes the court's opinion internally inconsistent. *Cf.* P.App. A at 12a (religious speech is no less protected than other speech).

Finally, the court below stated that discriminatory exclusion of religious speech from the student activity period was permissible, arguing that it would "be compensated in substantial measure by alternative means of communication which exist throughout the community." P.App. A at 42a. There is no evidence in the record to support this proposition. The students requested permission to meet during the student activity period in order to draw support from one another as holders of common religious beliefs in a secular school environment, and to discuss how to apply the principles of their faith to the unique set of circumstances they face at school as opposed to at home or at church. The opportunity to meet off-campus at night or on weekends is insufficient to meet these dual goals, especially given that the high school students are drawn from approximately a 100 square mile area. *See supra* note 4 (released time not a feasible alternative). On advice of counsel, school officials consider meeting on campus before or after school equally unconstitutional. J.A. 75, 93.

Moreover, even if adequate alternative fora did exist, they would be constitutionally irrelevant where the exclusion of speech results from content-based discrimination and not content-neutral time, place or manner restrictions. This Court on numerous occasions has stated that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place". *Schneider* v. *State*, 308 U.S. 147, 163 (1939); see *Healy* v. *James*, 408 U.S. at 183 (ability of student group to meet off-

campus immaterial). The right to engage in religious expression does not meaningfully exist if it may be exercised only in areas which a "benevolent government" designates as a "safe haven for crackpots." See *Tinker*, 393 U.S. at 513.[52]

IV. ACCOMMODATION OF HIGH SCHOOL STUDENTS' RELIGIOUS SPEECH PRESERVES THE PROPER BALANCE AMONG THE FIRST AMENDMENT CLAUSES.

A. Accommodation of high school students' religious speech avoids an unnecessary conflict between the Free Speech Clause and the Establishment Clause.

Accommodation of the religious interests of students by school officials does not violate the Establishment Clause. *Zorach* v. *Clauson*, 343 U.S. 306 (1952). In writing for the Court, Justice Douglas rejected the notion that public school officials cannot accommodate the religious interests of students: "To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." *Id.* at 314.[53]

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[52] The court below opined that religion belongs at home and in religious institutions and imposed its predilection on these students. P.App. A at 45a. Different longstanding traditions exist among religious groups with respect to whether to confine their overt religious expression to their homes and religious institutions, or to express their beliefs in all aspects of their lives, including time spent outside the home and religious institutions. Both traditions are genuine and sincerely held. However, nothing in the Constitution suggests one has greater legitimacy than the other, and the Constitution does not allow one to be given preference over the other, as is the result of the decision below. Neutral accommodation of equal access allows religious persons to act in accordance with their different traditions. Denial of equal access imposes one tradition on those holding the other. In addition, the decision below makes any Establishment Clause analysis futile in the public high school context. Yale Note, *supra* note 14, at 510.

[53] This Court has repeatedly reiterated the principles of accommodating neutrality. *See, e.g., Lynch* v. *Donnelly*, 104 S. Ct. 1355,

Because it ignored the accommodation principle, the court below believed it faced a "constitutional conflict of the highest order" between the Free Speech and Establishment Clauses. P.App. A at 36a. The Establishment Clause concerns can be addressed more than adequately without an absolute prohibition of the students' free speech rights. *See supra* pp. 42-43. However, even if this conflict truly did exist, the speculative Establishment Clause concerns should not prevail over these students' free speech rights for several reasons.

Since the core purpose of the First Amendment is to protect individual liberties, the balance should weigh heavily in favor of protecting free speech rights as opposed to requiring state suppression of religious speech. *See generally, McDaniel*, 435 U.S. 618 (1978); *Norwood* v. *Harrison*, 413 U.S 455, 469 (1973) (free exercise transcendent over Establishment Clause values where religion indirectly benefitted); *cf.*, L. Tribe, *American Constitutional Law*, Sec. 14-7 (1978) (Free Exercise Clause prevails over Establishment Clause as "the natural result of tolerating religion as broadly as possible rather than

---

1359 (1984) (the First Amendment "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"); *Roemer* v. *Board of Public Works*, 426 U.S. 736, 745-46 (1976) ("scrupulous neutrality by the State, as among religions," enforced but "a hermetic separation of the two is an impossibility") (Blackmun, J., plurality opinion); *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970) ("benevolent neutrality . . . permit[s] religious exercise to exist without sponsorship and without interference"). Indeed, this Court has frequently required state accommodation of individual religious beliefs and expression. *Widmar*, 454 U.S. 263 (1981) (state university required to allow students to meet on campus for religious activities); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *see also McDaniel*, 435 U.S. at 638 (Brennan, J., concurring) ("the limits of permissible governmental action with respect to religion under the Establishment Clause must reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause").

thwarting at all costs even the faintest appearance of establishment").

Arguably, the Establishment Clause is not self-enforcing, but is itself dependent on freedom of speech for effectuation. See *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937) (freedom of speech is the "matrix, the indispensible condition, of nearly every other form of freedom"). If freedom of speech is not protected, the Establishment Clause is dependent on the good faith of the state that it will not engage in value-laden, even subtly religious speech, without fear of challenge by a silenced citizenry. However, if freedom of speech is fully protected, citizens can restrain even the most direct religious speech by the state.

In addition, the Establishment Clause concerns raised by the court below rest on unsupported conjecture that students will misperceive constitutional reality, *i.e.*, the fear that students will misperceive equal access for religious speech, which in reality is state neutrality, as state advancement of religion. Thus, to choose the Establishment Clause over the Free Speech Clause in this context would be to sacrifice the fundamental free speech rights of high school students with the result of perpetuating, and indeed encouraging, constitutional misunderstandings on the part of students. The Constitution cannot operate in such a manner. See *Tilton* v. *Richardson*, 403 U.S. 672, 679, 682 (1971) ("hypothetical profile" does not justify holding Act of Congress unconstitutional under the Establishment Clause); *see supra* pp. 27-33.

Importantly, the denial of equal access itself creates more problems under the Establishment Clause than it solves. It requires that school administrators police students' speech, determining which is and is not religious, which itself creates excessive entanglement. *See supra* pp. 40-41. Also, denial of equal access imposes one religious tradition on those holding another religious tradition. *See supra* note 52. Finally, the Establishment Clause prohibits state hostility toward religion. As Con-

gress found in passing the Equal Access Act, students are interpreting the denial of equal access by their school districts and by federal courts as hostility toward religious speech. S. Rep. 98-357 at 10-12, 36. This concern also has been raised by federal judges considering this issue:

> Is neutrality still the objective or is it the fashion now to make the state the adversary of religious belief? . . . We should not forget, however, that the young student may also be given the impression that our government and the courts and the schools are hostile to all religious belief and practice. I would consider that a very great wrong to the children, to the Constitution, and to the Nation.

Lubbock Civil Liberties Union v. *Lubbock Independent School District*, 680 F.2d 424, 426 (5th Cir. 1982) (denial of petition for rehearing en banc) (Reavley, J., dissenting); *accord*, P.App. A at 53a (Adams, J., dissenting).

B. Prohibition of student-initiated extracurricular religious speech is constitutionally and practicably untenable.

The court below adopted a *per se* rule which "essentially rests on the view that collective religious speech simply may not take place within the walls of a public secondary school without violating the Constitution." P.App. A at 45a (Adams, J., dissenting); *id.* at 43a n.30. The practical implications of such a position are as troubling as the constitutional problems already discussed.

If private religious speech must be prohibited on public school property, the inexorable logic of this position will effectively terminate individual students' religious freedom at school. Besides causing many school administrators to prohibit religious student meetings, decisions similar to the one below have led many school administrators to prohibit all forms of private religious expression on school campus. For example, community service

activities by students have been prohibited [54]; religious conversations have been banned between students [55]; individual acts of religious observance have been banned [56]; research papers by students on religious topics have been prohibited [57]; and student yearbooks have been censored.[58]

Students whose personal conduct is otherwise exemplary may be disciplined solely for expressing their religious values and ideas at a time when other students are allowed to express themselves. The Constitution does not require school officials to discriminatorily ban students' extracurricular religious speech, and it should not require them to alienate a small number of students whose enrollment in the public high schools is beneficial to those schools.

The students before this Court have suffered a concrete violation of their freedom of speech. Their constitutional rights should not be sacrificed to a speculative misperception that is contrary to federal court precedent, congressional findings, and the established facts of this case.

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[54] S. Rep. 98-357 at 16 (benefit dance in school gymnasium for charities such as the American Cancer Society by youth group affiliated with the Young Women's Christian Association (YWCA) prohibited by Lubbock, Texas, school district).

[55] *Id.* at 17 (Boulder, Colorado school administrator prohibits group of two or more sitting together for a spiritual discussion).

[56] *Id.* at 18 (Minnesota fourth grader reprimanded for bowing head before a meal). *See also*, 130 *Cong. Record* S.8335 (daily ed. June 27, 1984) (statement of Sen. Hatch) (reprinting letter of El Paso, Texas, school district threatening blind special education student with review of educational program for engaging in public prayer (the rosary) on school bus and public witnessing of her faith at her school).

[57] S. Rep. 98-357 at 17 (research paper on the Resurrection of Christ unacceptable although papers on breast feeding, suicide notes, and demon possession were acceptable).

[58] See *School Cuts Bible Club From Book—Literally*, The Palm Beach Post, May 28, 1983, at 1 (using razor blades, school administrators cut pictures of students in the Bible Club from student yearbook for fear of Establishment Clause violation).

Equal access reflects our country's historic tolerance for neutral accommodation of religious beliefs. The decision below conveys the opposite message. It teaches high school students that speech is free only if it is purged of religious content and that government neutrality requires invidious discrimination against their own voluntary, self-initiated religious activity. Equal access represents a sound accommodation of religious speech among students within the framework of the First Amendment. As Judge Adams concluded, "[w]hen the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, I believe the Constitution and the Nation are the better for it." P.App. A at 62.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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NO. 84-773

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MICHAEL BENDER, et al.,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Does the Establishment Clause require that denial of permission to meet during regular school hours of compulsory attendance to a student initiated and composed group, supervised by a school teacher, meeting on public secondary school property in school rooms, and wishing to meet for religious exercise, including prayer, during the first classroom period of the day on two days per week when student clubs having a direct or indirect relation to the curriculum and which promote the intellectual, physical and social development of students, meet?

2. Was a generally open forum created for indiscriminate speech during the club period at Williamsport Area High School?

PARTIES TO THE PROCEEDING

The parties to the proceeding as originally instituted are set forth in the caption of the case. (P. App. 1a)[1]

The Williamsport Area School District did not appeal from the judgment of the District Court. This appeal was taken by Respondent herein. However, the School District will be affected by the decision in this case.[2]

[1]Bender, Braggs, Robert, Kriner, Hunter, and Herzog graduated within one week after this suit was instituted (June 2, 1982). Seevers, Strayer, Brossman, and Marshall, graduated in June of 1983.

On November 30, 1983, Petitioners moved to add Plaintiffs Michael Bender, Michele Marshall, Julie Hobart, Jeffery Fredroff, Brian Foelsch, Julie, Kim, and Heidi Ulmer, and Petros an unincorporated association. This motion was granted by the Court of Appeals in its Opinion (P. App., 4a). Some of these new Plaintiffs are presently students at the school.

[2]The school board voted 8-1 not to appeal (Respondent dissenting). The school

district has not participated in this appeal, although it has abided by the decision of the District Court until revised by the Court of Appeals, and now is abiding by the decision of the Court of Appeals. Petros has not met during the 1984-85 school year.

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NO. 84-773

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MICHAEL BENDER, et al.,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

COUNTER STATEMENT OF CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

> or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Respondent does not agree that the Equal Access Act, Title VIII of Public Law 98-377, enacted on August 11, 1984, is applicable to this case.

COUNTER STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The original Plaintiffs filed suit on June 2, 1982, prior to the end of the school year, against the Williamsport Area School District, the superintendent, the principal of the high school and each school board member in his individual and school board member capacity (J.A. 13). The suit was for injunctive and civil rights damage relief based on an alleged violation of the First Amendment of the

United States Constitution by the Williamsport Area School District. The alleged violation was the denial of the exercise of freedom of speech and the free exercise of their religion without regulation or restriction by the State imposed on the basis of the content of the speech (J.A. 17, 18). After answer by the Defendants, the filing of depositions and affidavits both, the Defendants and Plaintiffs on July 19, 1982 and July 28, 1982, moved, pursuant to F.R.C.P. 56, for summary judgment (J.A. 35, 50). On May 12, 1983, the District Court filed an Opinion. Bender v. Williamsport Area School District, 563 Fed. Sup., 697 (MDPA 1983), in which it granted summary judgment for Defendants on Petitioners free exercise claim, and granted summary

judgment for Plaintiffs on their freedom of speech claim and against Defendants on the establishment of religion defense.

The District Court relied heavily on the case of Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981) which it believed could not be meaningfully distinguished from the case at bar. In fact, the Court believed that if the case at bar did not involve a high school, Widmar would be controlling. The Court, recognizing that the case was not free from doubt, emphasized the crucial nature of the facts (P. App. 101a).

With respect to the Establishment Clause defense, the Court distinguished the cases of Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962), The School

District of Abbington v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1964), and Illinois Ex Rel McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), on the ground that the religious activity was required by the State and that it took place en masse (P. App. 95a). The Court further indicated that the organization was willing to occupy a less favorable position among the various other clubs (P. App. 96a) on the basis that it would not use the bulletin boards or public address system and was not asking for an advisor, but merely a monitor, which would monitor order (policeman in the park) (P. App. 100a). However, the Court did not as part of its decision preclude advisor status for the teacher (P. App.

99a 100a). The Court noted that high school students have become more advanced in the twenty years since the Engel and Abbington cases, supra, (P. App. 94a).

On June 10, 1983, an appeal from the Order of the District Court was taken to the United States Court of Appeals for the Third Circuit by John C. Youngman, Jr., one of the members of the school board of the Williamsport Area School District, Respondent herein.[3]

[3]Respondent left the School Board in December, 1983 at a time when he had a child in ninth grade at the high school. At all relevant times and at present, Respondent has had a child who was and is a student at the high school, Benjamin Antes Youngman. Since the school board voted 8-1 not to take the appeal, Respondent, as an individual party, sued individually, would have standing as parent and guardian of his son to challenge the decision of the lower Court, inasmuch as the public body was not properly challenging the lower Court

Petitioners did not appeal to the Circuit Court from the grant of summary judgment to Defendants on Petitioners' free exercise claim, and the Court of Appeals did not consider the claim in its Opinion.

On July 24, 1984, the Third Circuit Court of Appeals filed an Opinion (741 Fed. 2d, 538 (CA 3 1984) in which it affirmed the District Court's holding that the students had a valid First Amendment interest to engage in their proposed activity on the grounds of

decision. Additionally, a successor of Respondent, Reverend David L. Phillips, has agreed to be substituted for Respondent in his public official capacity for purposes of this appeal pursuant to Supreme Court Rule 40. He also is Respondents' minister. Finally, Respondent is not liable for counsel fees, a motion for which is being held in abeyance pending the outcome of this

freedom of speech. The Circuit Court then held with respect to the establishment defense that the second and third prongs of the test enunciated in the case of Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d, 745 (1971) were violated, that the primary effect of the proposed activity was to advance religion and that there was excessive entanglement of the government with religion.

appeal (J.A. 152-155). For these reasons and the reasons set forth in the Brief of the United States at page 5, footnote 5, the case remains justiceable, both with respect to standing and mootness. In addition, on the question of mootness, the Circuit Court held that the failure to certify the class made the case capable of repetition yet evading review (P. App. 4a). Thus, the Court granted Petitioners' motion to add parties Plaintiff without objection.

The Court of Appeals distinguished the Widmar case on the basis that high school students were less mature and more impressionable than university students (P. App. 25a) and would be less able to appreciate that permission for Petros was granted out of a spirit of neutrality rather than advancement. Also, the structured and controlled environment of a high school, including compulsory attendance as opposed to the more fluid environment of a college campus, was more likely to communicate a message of endorsement of religion (P. App. 26a). Further, there would be involuntary contact between non-participating students and religious groups using classrooms for meeting following which other classes would be

held therein (P. App. 26a). Additionally, the activity would be monitored by a teacher, parent or other adult. This adult, in the high school principal's view, was to be there as someone who would help the students (P. App. 26a). The combination of all these items would convey the perception that Williamsport was endorsing and encouraging religious practice (P. App. 27a).

All of the above factors were regarded by the Court of Appeals as also indicating an intimate and continuing relationship, amounting to excessive entanglement.

The Court then went on to reconcile the free speech and Establishment Clause provisions under the circumstances

of this case and concluded that since there was no free exercise problem, that the establishment problems outweighed the free speech problems in this case and reversed the decision of the District Court.

On August 15, 1984 the Third Circuit Court of Appeals denied a motion for rehearing and rehearing en banc. The Petition for Certiorari was filed by Petitioners herein on November 13, 1984 and certiorari was granted by this Court on February 20, 1985.

B. STATEMENT OF FACTS

A. THE PROPOSED ACTIVITY

The original Plaintiffs in this case, students at the Williamsport Area High School, sought to organize a group known as "Petros," which would "meet for

the purposes of [students] aiding each other in a social, emotional and intellectual personal growth and development by prayer, the application of God's Holy Word to their problems and sharing of personal experiences." Complaint Paragraph 31 (J.A. 16). The Complaint also stated that "the Plaintiffs are Christians who believe they have a duty to perform all tasks in school to the glory of God, to pray during the day, including the school day, to worship with their fellow Christians and to share with each other how their religious faith aids them with their daily problems" (J.A. 18). The purpose of the club was also stated to school authorities in the application for approval (P. App. 5a, 6a):

PROPOSAL FOR A NEW STUDENT ORGANIZATION

NAME OF THE ORGANIZATION

Petros (the Rock)

NATURE OF THE ORGANIZATION

The organization will be a non-denominational prayer fellowship. Participation will be voluntary and open to all students.

PURPOSE OF THE ORGANIZATION

The purpose of the organization will be to promote spiritual growth and positive attitudes in the lives of its members.

LEADERSHIP

Selection of leaders will be by democratic election. The leaders will be responsible for directing the meetings and coordinating activities in a manner that will carry out the purpose of the organization.

MEETINGS

> Regular meetings of the organization will be held on school premises during the Tuesday and Thursday morning activity periods. They will include Scripture reading, discussion, prayer and other activities which may be of interest to the group.

SUPERVISION

> Meetings of the organization will be supervised by a faculty advisor. Student attendance may be verified by the signing of a roster.

The students asked permission to meet during the school's regularly scheduled activity period. They were informed by the principal that they could not advertise their meetings either by announcing or posting announcements on bulletin boards (affidavit of Lisa Bender, J.A. 53).

Petros was allowed to hold one organizational meeting, at which approximately forty-five students were present. During the meeting, passages of scripture[4] were read, and students who wished to do so, prayed. After this first session, however, the school administration withheld permission for further meetings pending investigation as to their legality. After consultation with the school's attorney, the Williamsport School Board denied the student's request for permission to meet. The President of the School Board wrote to Bender, stating:

> The solicitor [has] advised the Board that to approve your pro-

[4]The record does not reveal from what source this scripture was derived.

> posal would be a violation of existing case law and therefore, an improper action. The Board decided, therefore, to deny your appeal.
>
> Please be assured that neither the School Board nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.
>
> P. App. at 6a (Letter of R.F. Eberhart).

B. THE ACTIVITY

The activity period at Williamsport Area High School is held during a thirty minute time slot regularly provided on Tuesdays and Thursdays, during which student groups may conduct meetings.[5] The school day begins at 7:45

[5] Statutory provision for extracurricular activities in Pennsylvania public schools is contained in Pa. Stat. Ann. tit. 24, §§5-511 (Purdon 1962 & Supp. 1983), which provides:

a.m. when all students must be in their homerooms. School supervision of students begins the moment they enter the school premises. P. App. at 7a (Affidavit of Principal Wayne Newton). The activity period starts at 7:57 a.m., after attendance has been taken in homeroom and the school day has begun. Those students who do not par

(a) The board of school directors in every school district shall prescribe, adopt, and enforce such reasonable rules and regulations as it may deem proper, regarding (1) the management, supervision, control, or prohibition of exercises, athletics, or games of any kind, school publications, debating, forensics, dramatic, musical, and other activities related to the school program, including raising and disbursing funds for any or all of such purposes and for scholarships, and (2) the organization, management, supervision, control, financing, or prohibition of organizations, clubs, societies and groups of the members of

ticipate in a club may study in the library, visit the school's computer station, examine career or college placement materials, or simply remain in their homerooms until the next class period begins. Participation in activities is voluntary, although each student must be

any class or school, and may provide for the suspension, dismissal, or other reasonable penalty in the case of any appointee, professional or other employe, or pupil who violates such rules or regulations.

....

(c) The board of school directors may permit the use of school property, real or personal, for the purpose of conducting any activity related to the school program, or by any school or class organization, club, society, or group, (2) authorize any school employe or employees to manage, supervise and control the development and conduct of any such activities, (3) employ or assign any school employee to serve in any capacity in connection with any such activities.

on school grounds and accounted for during the activity period. Pennsylvania law requires that students participate in a minimum amount of instruction per year, which is variously calculated as: (1) 180 school days per year, with each day consisting of seven hours, minus 1½ hours for lunch and breaks; (2) a school week consisting of 27½ hours of instruction; or (3) 990 hours of instruction each year. Pa. Stat. Ann. tit. 24, §§15-1504 to 1504 (Purdon Supp. 1983).[6]

[6]The record does not show whether the activity period counts toward the minimum requirement at Williamsport. However, the Pennsylvania State Department of Education has determined in Basic Education Circular 3-84 dated July 1, 1984, that "activities included as pupil instruction time are clubs, student councils and similar activities conducted during school hours." (Not part of the record).

P. App. 8a (affidavit of Principal Wayne Newton).

At the time of the application for Petros, approximately twenty-eight clubs were in existence[7].

[7] As described in a recent school yearbook, student clubs which are currently active include: Student Government; Key Club (a student service organization performing community work); Class Organizations (officers for each class); Business English Club; Future Homemakers of America (devoted to learning good home practices and providing service to various charity organizations); Vocational Technical Club; Spanish Club; Speech and Drama Club; Ecology Club; The Cherry & White (student literary art magazine); Billtown Banner (student newspaper); La Memoire (student yearbook); Band; Choir; Office Aides (assisting in filing, answering telephones, and running errands).

Other clubs which have been approved in the past and might be renewed if interest warranted are the Archery; Art; Audubon; Aviation; Bowling; Chemistry; Chess; Field, Forest and Stream; Future Nurses; Future Teachers; German; Poetry; Photography; and Ski Clubs. App. at 367. (Affidavit of Principal W. Newton).

None of the clubs are what may be described as "controversial". The nature of the various clubs existing at Williamsport Area High School when this suit was instituted are set forth in the joint appendix at pages 109 through 141 inclusive. They are either directly or indirectly related to the curriculum at Williamsport Area High School. The Key Club, a service organization sponsored by Kiwanis International, the precise nature of which is set forth at pages 2 and 3 of the Brief as Amici Curiae, Kiwanis International and Key Club International, could be described as being

There is no formal mechanism or procedure for applying for school sponsorship or sanctioned status at Williamsport, other than oral and possibly written request as was done by the students wishing to have Petros recognized as a school activity. Id.

indirectly related to the curriculum inasmuch as no grades are given for service as such. However, annually at commencement, prizes for service of one kind or another are awarded.[8] Political clubs, religious clubs, and clubs of a controversial nature have not applied for admission to the activity period at Williamsport Area High School. What clubs are admitted is a matter ultimately for decision by the school board upon application.[9] Petros is the first club of a controversial or religious nature to have applied for admission to the activity period.

[8] At this year's commencement, Respondent counted eight separate prizes based in whole or in part on service.

[9] See Appellate Court Opinion (P. App. 7a, footnote 6).

The Williamsport School District has delegated responsibility for supervision of student clubs to the high school principal (J.A. 89). Williamsport High School's policy is to allow students to suggest topics for new clubs, subject to the official approval of the school's administrators (J.A. 64, 66). The principal's policy regarding proposed new clubs is that "[a]ny student activity or club which is considered to contribute to the intellectual, physical, or social development of the students and is otherwise considered legal and constitutionally proper would likely be approved as an officially sponsored and sanctioned school activity" (J.A. 104). Thus, approval of suggested clubs is not automatic; the school retains the prerogative

of rejecting clubs on a case-by-case basis. Furthermore, clubs which are approved are considered to be "sponsored and sanctioned" by the school.

Faculty advisors for student clubs are selected by the school administration on the basis of the connection between a faculty member's background and the subject matter of the club (J.A. 144). Therefore, the school attempts to provide each club with an advisor who has envinced a particular interest in the club's activities. Faculty advisors are expected to play an active role in the conduct of clubs, assisting students (J.A. 83) and keeping the administration informed of the club's activities (J.A. 76).

C. GENERALLY

The students were offered release time for their religious exercise by the school district (P. App. 71a, J.A. 39 Affidavit of Oscar W. Knade, Jr.) and Respondent's church offered its facilities and supervision for the activity. The students refused this offer; for what reason is not known. The implication of Petitioners that the size of the campus or its distance from facilities for religious exercise make the offer of release time is an empty offer should be disregarded, because the student may bring automobiles to the campus by special permission or their parents may drive them (Deposition of Newton J.A. 68). Furthermore, there is no evidence that the district made an offer which could not be accomplished.

The Court is requested to take judicial notice that students in grades nine through twelve are at a stage of their lives when they are most susceptible and subject to peer pressure.

SUMMARY OF ARGUMENT

The Court of Appeals was correct in finding that the introduction of a club devoted to religious exercise during the club period at Williamsport Area High School violated the Establishment Clause. This is because both the advancement of religion and excessive entanglement prongs of the Lemon v. Kurtzman test are violated. All of the Appellant Courts which have considered this issue thus far have so held.

This is another attempt to put organized religious exercise and prayer

into the public secondary school at a time when the students are compelled to be there by law. This attempt must fail because it is a violation of the Establishment Clause and because there is no free speech right in Petitioners.

The Establishment Clause is violated because the policy has the primary effect of advancing religion and creates an excessive entanglement of the government with religion. Further, the basic purpose of the Establishment Clause, to prevent devisiveness among the people, is undercut.

The primary effect of the policy would be to advance religion because the State approves the clubs and religious exer cises, including prayer, will be performed in the public schools during

the hours of compulsory attendance and be supervised by an advisor/monitor. The club will also be given special treatment not accorded other clubs, and if the teacher may only act as a monitor, there will be a perception of advancement of religion by immature and impressionable school children who are compelled to be in the area of the activity and who will be proselytized.

The policy will produce excessive entanglement of government and religion because it requires continuing teacher supervision for all of the reasons enunciated with respect to advancing religion. Further, the policy will divide children along religious lines and religious domination of the forum will be the result of the policy.

The first Lemon test is violated if the Court focuses on the proposed amendment to the policy. The Equal Access Act has no application to the case at bar but, if it does, it contains all of the problems heretofore mentioned, and in addition, violates all of the tests enunciated by Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d, 745 (1971).

There is no free speech right involved because no open forum was created. The university situation present in the case of Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981), is not controlling in the public secondary school situation.

No open forum has been created, because the school district has not given

up its right to determine what clubs shall be permitted, and the clubs permitted to date have been uncontroversial and designed to inculcate traditional values of a secular nature, promote educational skills or promote new fields of knowledge not yet made part of the curriculum for which credit is given toward graduation. No club has ever operated either administratively or procedurally as is proposed, and permitting this club to exist would lead eventually to religious domination of the club system.

The alternatives suggested by Petitioners do not address the Establishment Clause problems present.

If the Court holds that there is an open forum and that there is a violation of the Establishment Clause, then

the reasoning and result of the Third Circuit Court of Appeals with respect to the accommodation of the two clauses should be upheld.

ARGUMENT

Respondent agrees substantially with the position taken by Amici Kiwanis International and Key Club International with respect to the open forum question and by the American Jewish Congress in their Brief with respect to the Establishment Clause violation in this case. Respondent is also indebted to Ms. Ruti Teitel for her article "The Unconstitutionality of Equal Access Policies and Legislation allowing organized Student-Initiated Religious Activities in the Public High Schools: a Proposal for a Unitary First Amendment

Forum Analysis", to be published, which collects the many First Amendment cases applicable to the situation in the case at bar in a coherent way, together with their various discussions and holdings, so that somehow a Brief may be written on this subject within the perimeters set by the rules of the Supreme Court. The article gives a comprehensive overview of the legislative history of the Equal Access Act and thus should be of value in future cases before this Court.

This Brief will not attempt a comprehensive discussion of the legislative history of the First Amendment, such as is contained in the dissent of Mr. Justice Rehnquist in Wallace v. Jaffree, (_____ U.S. _____ at _____, 53 U.S. Law Week 4680, 4681) Respondent would only note the following:

1. The legislative history is fairly sparse and therefore subject to ambiguous construction;

2. If Representative Livermore's language had more than three-fifths of the House of Representatives in favor of it, why would Livermore and the others, without debate, have agreed to Madison's language with which they were originally unsatisfied. See Wallace v. Jaffree, Rehnquist J. dissenting, U.S. at 53 U.S. Law Week 4665 at 4681;

3. The constitution Pennsylvania of 1776 in effect when the First Amendment was adopted provided as follows with respect to religion:

> "Second. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of

> right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent; Nor can any man, who acknowledges the being of God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship; And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship."

I. ALLOWING THE PROPOSED CLUB VIOLATES THE ESTABLISHMENT CLAUSE

Petitioners argue that there is no Establishment Clause violation, because the Establishment Clause has no application to speech made by students, but is applicable only to State speech. Petitioners' Brief page 18. First there is State speech involved in the case at bar, e.g. the advisor nature of the

teacher. Secondly, violations of the Establishment Clause do not depend solely on vocal speech, but also depend on actions and policies instituted. See e.g. Wallace v. Jaffree, ____ U.S. _____, 53 U.S. Law Week 4665 (June 4, 1985) (State statute permitting moment of silence allowing prayer unconstitutional) and Karen B. v. Treen, 653 Fed. 2d 897 (CA 5 1981), affirmed, 454 U.S. 913 (1982) (State allowing student initiated prayer unconstitutional). If Petitioners merely look to the policy or the statute as constituting the prohibited speech, then the policy of permitting the religious entity in the case at bar would also be State speech. Furthermore, it is the State actions in addition to any State statute involved that have been

looked in deciding that various State policies violated the Establishment Clause. See e.g. McCollum v. Board of Education, 333 U.S. 203 (1948) (State statute permitting outside religious teachers in the school for religious instruction during regular class hours invalidated on grounds that State premises, funded by tax dollars, were being used and that State policy provided by compulsion the audience for the instruction among other grounds).

The second of Petitioners' arguments, that the access desired in this case is consistent with the tri-partite test of Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) is discussed at greater length, infra, in this Brief.

Respondent is an elder in the Presbyterian Church, the parent of four children three of whom have graduated and one of whom is presently attending Williamsport Area High School. Respondent was a member of the Board of Directors of the Williamsport Area School District for ten years until December of 1983. His church and supervision were offered for Petitioners' religious group to conduct religious exercise on a released time basis but this offer was refused. As such, he is in a somewhat unique position from which to evaluate the proposed religious entity vis-a-vis the school system.

The basic policies underlying the Establishment Clause of the Constitution are set forth in School

District of Abbington Township, Pennsylvania. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 1567 10 L. Ed. 2d 844 (1963), Brandon v. Board of Education of Guilderland Central Schools, 635 F. 2d 971, 974 (CA 2 1980 cert. denied), 454 U.S. 1123 (1981), rehearing denied, 455 U.S. 983 (1982). It is submitted that these policies, preservation of religious purity, preservation of the integrity of both religion and government, and preservation of the ability of both religion and government to prosper are violated by mandating the religious entity in the public secondary schools during hours of compulsory attendance under State supervision.

It is no accident that all of the appellate cases which have thus far

decided the issue, prohibit a religious club for religious exercise in the secondary public schools. Johnson v. Huntington Beach Union High School District, 137 Cal. Rptr. 43, 68 Cal. App. 3d 1, (cert. denied), 434 U.S. 877 (1977), Brandon v. Board of Education of Guilderland Central Schools, 635 F. 2d 971, 974 (CA 2 1980 cert. denied), 454 U.S. 1123 (1981), Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F. 2d 1038, reh. denied, 680 F. 2d 424 (5th Circuit 1982), cert. denied, 103 S. Ct. 800 (1983), Nartowicz v. Clayton County School District, 736 F. 2d 646 (CA 11 1984) and the Court of Appeals in the case at bar. While these appellate cases do not control the case before this Court, they

should be carefully considered because they represent a unified result on the question of whether a religious club for religious exercise should be permitted in the secondary schools during the hours of compulsory attendance or before and after school. Much of the reasoning of these Courts is persuasive to Respondent and will be discussed, infra.

Already, the admonitions, set forth in Schempp and Brandon, supra., of Williams, Jefferson and Madison seem to have been, are being, or will be played out in the Williamsport Area School District if the religious entity is permitted as proposed. What does it say about the religious purity of youngsters who are accommodated by being offered released time, but refuse the offer?

What is the effect on the purity of their religiosity of opining about the maturity, impressionability and non-impressionability of children ages fourteen to eighteen?[10] Is the school district harmed in its educational mission by having to spend its time monitoring activities to see that no proselyti- zation occurs, and monitoring the media to see that they are not used for religious purposes? It has become abundantly clear to Respondent that neither religion nor education prosper in the atmosphere created by the object of this lawsuit, the injection of the proposed religious entity into the secondary public school system.

[10]See Legislative history of the Equal Access Act, U.S. Code Congressional and Administrative News, No. 7, Sept. 1984, pp. 2349-2396 incl. at p. 2357.

A. THE PRIMARY AFFECT OF THE POLICY IS TO ADVANCE RELIGION OBJECTIVELY.

Petitioners do not argue that the tri-partite type test enunciated in the case of Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d, 745 (1971), is inapplicable to this case. Indeed this Court, while indicating that the test is not absolutely controlling in every case, has reaffirmed and used the test most recently in the case of Jaffree v. Board of School Commissioners, _____U.S. _____ (June 4, 1985); 53 U.S. Law Week 4665.

The Lemon test for advancement is both objective and subjective in nature. Lynch v. Donnelly, 104 S. Ct. 1355 (1984), (O'Connor J. concurring).

1. THE CLUB MUST BE APPROVED BY THE STATE.

The legal basis for clubs in the secondary schools of Pennsylvania is found in Acts of 1949, March 10, P.L. 30 Art. V. Sec. 511, 24 P.S. Sec. 5-511(a), which provides:

a. "The Board of school districts in every school district shall prescribe, adopt and enforce such reasonable rules and regulations as it may deem proper, regarding...

2. The organization, management, supervision, control, financing or prohibition or organizations, clubs..." (P. App. 7a Circuit Court Opinion Note 6).

To an objective observer a club may be prohibited and conversely a club may be organized. The State thus approves or disapproves any club. Permitting

Petros would be direct State approval of the club. Thus, the objective observer would observe State approval of the club activity.

2. THE STATE PROVIDES AN AUDIENCE FOR PROSELYTIZATION AND FINANCIALLY SUPPORTS THE CLUB.

By providing space, heat and light for the club there is no question of financial support. The State, in addition, pays the salary of the supervising teacher. Furthermore, the State provides the audience for the club through its compulsory attendance laws. The first and last of these factors was held in McCollum v. Board of Education, supra, to invalidate a statute providing for religious instruction in the schools.

In addition to the case at bar, the McCollum and Abington cases, supra,

also involved the use of the compulsory attendance laws to provide an audience. This point was also made in the case of Engel v. Vitale, 370 U.S. at 439. In the case at bar, the aid is direct aid to the religious activity, unlike the indirect aid present in the case of Mueller v. Allen, 103 Supreme Ct. 3062, 3069 (1983).

3. THE STATE GIVES THE CLUB SPECIAL TREATMENT.

By the special limitations on the proposed activity such as non-use of school media and the characterization of the teacher as a "monitor" an objective observer would conclude that there is something special about this club, which is not applicable to other clubs. Hence the conclusion of endorsement and advancement of religion by the State.

4. THE STATE ADVISES THE CLUB AND THEREFORE PROMOTES THE CLUB.

On the other hand, the lower Court did not take away the advisor status of the teacher in the case at bar (P. App. 99a, 100a). Thus, an objective observer would also conclude that advice in fact will be given to the students, and thus the State to an objective observer, is promoting the religious activity.

B. THE PRIMARY AFFECT OF THE POLICY IS TO ADVANCE RELIGION SUBJECTIVELY.

1. STUDENTS IN A PUBLIC SECONDARY HIGH SCHOOL ARE YOUNG AND IMPRESSIONABLE.

That students in a public high school are immature and impressionable has been stated and reiterated by this Court several times. Tilton v. Richardson, 403 U.S. 672, 686 (1971),

"There are generally significant

differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The "affirmative if not dominant policy" of the instruction in pre-college church schools is "to assure future adherents to a particular faith by having control of their total education at an early age." Walz v. Tax Comm'n. supra, at 671, 90 S. Ct., at 1412. There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students."

This fact was reiterated in the case of Widmar v. Vincent, 545 U.S. at 274 note 14 and Wallace v. Jaffree, ___ U.S. at _____ 53 U.S. Law Week 4677 (O'Connor J. concurring). That children age fourteen to eighteen are immature and impressionable can be determined from one's own observation. Legislative history of the Equal Access Act indicates attempts to build the case the other way through the use of students to opine that such is the case, and through the use of Law Review notes such as found in 92 Yale Law Journal 499 (1984). This note takes statements from psychological treatises out of context and concludes from those statements that children between the ages of fourteen and eighteen are not immature and not impressionable. In addition to

being opinions based on hearsay, it is apparent to Respondent that the authors of that note have never raised a child between the ages of fourteen and eighteen.

There are numerous examples of laws in our society which belie the notion of maturity and non-impressionability of children between the ages of fourteen and eighteen. For instance, a child is not treated as an adult by our juvenile justice laws. A child is not an adult prior to the age of eighteen. See e.g. 25 P.S. Sec. 2811(a) (Voting: 18 yrs.); 11 P.S. Sec. 1901 (18 and older - adult except where otherwise provided by law) 42 U.S.C. 1973 bb to 1973 bb - 1 (voting); U.S. Constitution, Amendment 26 (Voting). In the same year

that congress was passing the Equal Access Act, it afterward passed amendments to the child abuse laws, but retained a provision for those to be covered by the Act being children under the age of eighteen 42 U.S.C.A. Sec. 4102(1). If children under the age of seventeen (24 P.S. Sec. 13-1326) were not impressionable and immature, why would there be a need for the compulsory attendance laws in the first place?

Finally, the Court is asked to take judicial notice of the immaturity and impressionability of children between the ages of fourteen and eighteen.

Thus, the Courts of Appeals in the case at bar, Brandon, Lubbock, Johnson, and Nortowicz, supra, have based their conclusions on the fact that imma-

ture and impressionable youngsters are likely to view religious exercises carried on in State buildings during the hours of compulsory attendance with teacher supervision as endorsement and promotion of the activity by the State. All of the objective criteria set forth supra, are also likely to give an understanding to a youngster that the State endorses and promotes the activity. See also the case of Stone v. Graham, 499 U.S. 39 (1980) which prohibited the displaying of the Ten Commandments in the public school.

Congress itself in the Equal Access Act has paradoxically admitted the impressionability and immaturity of children between the ages of fourteen and eighteen when it took the position that

students were too young and impressionable to understand that in barring a religious club, the school is not displaying hostility to a religion, but rather endeavoring to remain neutral. S. Rep. No. 357, 98th Cong., 2d Sess. 36 (1984) "this committee finds that students reasonably perceive the denial of access for religious speech as State hostility toward religion". The notion of reverse perception, hostility to religion, as being relevant to the establishment considerations has been rejected by this Court. Epperson v. Arkansas, 393 U.S. 97 at 106; Abbington v. Schempp, 374 U.S. 203, 225 (1963).

2. TEACHERS ARE ROLE MODELS AND PROSELYTIZATION WILL OCCUR.

Petitioners argue that the teacher/monitor is no more than a

"policeman in the park". (Brief for Petitioners, p. 39. Petitioners misconceive the nature of the teacher-student relationship and do the same diservice with such an assertion. A teacher is continually with the students, on a day to day, week to week, month to month and year to year basis. Their relationship is not casual, and the term applied to the teacher-student relationship of "in loco parentis" is apt. Teachers are by and large caring and concerned individuals whose feelings are reciprocated by their students. Naturally, not every teacher is ideal, but to reduce the teacher to the status of "policeman in the park", is to denigrate the relationship and the profession.

One has only to remember one's

own school days to understand the role model nature of a teacher. What will a student think when he sees his teacher supervising the club? Will the thought of obtaining a better grade influence a decision to join the club? Will he be influenced to join the club simply because the teacher is a role model? Respondent believes the answer to these questions is yes. But this type of subtle proselytization is not the only proselytization that will go on in the public schools.

If Petitioners are correct in their position on the open forum, then overt and organized proselytization should be allowed. McDaniel v. Paty, 435 U.S. 613, 626 (1978). Free exercise rights have been associated with tradi-

tional public forums. Cantwell v. Connecticut, 310 U.S. 296 (1940). Petitioners argued in the District Court that they had a right to free exercise of religion, but did not appeal or argue in the Court of Appeals on this ground. This undercuts their position on open forum status discussed, infra.

However, there is one form of proselytization in addition the more subtle teacher role model type of proselytization which will be present in the high school if the proposed activity is permitted, and that is that it is impossible to prevent students from going one-on-one with each other in the public school setting. This was iterated by Mr. Seevers, counsel for Petitioners, in his statement to the Williamsport Sun-Gazette

(Respondents' Brief in Opposition to Petition for Certiorari, Page 4).

Finally, it is the command of religion that its adherents proselytize.[11] While the nature of politics may be compromise, the nature of religion is not. This is the teaching of the First Amendment, that the government shall not seek to interfere with religion, because a religious belief cannot be compromised unless its adherent changes his belief. The fabric of

[11] The Bible, King James Version (1611) New Testament the Gospel according to Saint Matthew, Chapter 28 verses 18, 19 and 20

"And Jesus came and spake unto them, saying, All power is given unto me in heaven and on earth"; 19 - "Go ye therefore, and teach all nations, baptising them in the name of the Father, and of the Son and of the Holy Ghost"; 20 - "Teaching them to observe all things whatsoever I have commanded you; and, low, I am with you always, even unto the end of the world, amen".

society beneath the mantle of the Constitution with respect to religion is very thin. Where religious beliefs and the State collide, society can be torn apart, e.g. the American Civil War.

3. THE STUDENTS HAVE ALREADY BEEN ACCOMMODATED.

Far from showing hostility to the students in this case, the attempt on the part of the school district to provide release time for the students for their religious activity indicates anything but hostility towards religion, objectively and subjectively. In fact, if the students are unable to accept the accommodation provided for by this Court in Zorach v. Clouson, 343 U.S. 306 (1952), then to permit the activity as proposed would exacerbate the notion of

special treatment being given for young and impressionable children.

C. THE POLICY PRODUCES EXCESSIVE ENTANGLEMENT OF GOVERNMENT AND RELIGION.

Compulsory attendance laws and financial aid in the form of building, heat and light, are also indicia of the presence of excessive entanglement prohibited by the third Lemon test, supra. However, it is the addition of teacher supervision and monitoring to the special nature of the proposed activity that creates the greatest and continuing problems of excessive entanglement between religion and government. In addition, the proposed activity will inevitably create devisiveness and religious domination of the forum.

The Appellate cases, including

the case at bar, Brandon, Lubbock and Johnson, supra, held that there was excessive entanglement in violation of the third Lemon prong.

1. TEACHER SUPERVISION.

The equal access approach being attempted in the case at bar of voluntariness, student initiation and lack of access to the media necessitates a continuing monitoring by the government to ensure the retention of these special characteristics. This would be in the form of the teacher/monitor, as proposed in the case at bar. But there will be further monitoring needed to ensure that the teacher remains only a monitor and not an advisor as is provided for every other club.

The notion that the teacher will

not be drawn into the activities of the entity is simply unworkable. What is to hap-pen if one of the students in the club disagrees with the prayer to be prayed and requests that it not be done? Who will decide in the event of a disagreement? Every other club has a teacher to give direction and advice, but not the special entity proposed; nor has there been any proposal by Petitioners for the resolution of such disputes.

As was said in the Lemon case, 403 U.S. at 620, "the very restrictions and surveillance necessary to ensure that teachers play a strictly non-idiological role gives rise to entanglements between church and State".

2. DIVISIVENESS

One of the principal objects to

be obtained by the separation of church and State is the eschewal of strife and division among religions. Mueller v. Allen, 103 Supreme Ct. 3062, 3069 citing Committee for Public Education v. Nyquist, 413 U.S. 756, 796 (1973). McCollum, 330 U.S. at 231 (Frankfurter, J., concurring).

The Circuit Court in the case at bar indicated that instead of uniting students from varying backgrounds and beliefs, prayer in the public schools segregates students along religious lines. Respondent agrees.

3. RELIGION WILL DOMINATE THE CLUB SYSTEM.

The case of Widmar v. Vincent, 102 S. Ct. 269 at 277, indicates that if there were emperical evidence that religious groups would dominate the forum,

the advancement of religion would be the forum's "primary affect". Emperical evidence may be present in the case at bar by the number of religious groups that have filed amicus briefs on behalf of the Petitioners in this matter. If the Evangelical persuasion is permitted entry into the club system, can the Roman Catholic, Jews and other Protestant denominations stay out? If for no other reason than the protection of their children from proselytization, it is submitted these groups would have to become a part of the club system.

Williamsport has some eighty and more different churches and synogogues covering an extensive spectrum of religious beliefs. If only a third of these religions seek admission to the club

system, the forum would be comprised more of religious clubs than any other kind. Also, Williamsport is the hometown of the students, where churches are in competition with each other for members. Does one suppose that the audience of some one thousand seven hundred fifty students provided by the compulsory school laws of Pennsylvania at the Williamsport High School would be eschewed, when students belonging to other churches had their clubs in the forum? It is submitted that religious domination of the forum would be the natural result of permitting the proposed activity. Such being the case, further excessive entanglement between religion and government is inevitable.

D. THE PURPOSE TEST.

Respondent had originally been inclined to concede the argument on the purpose test to Petitioners in view of prior cases before this Court such as Widmar v. Vincent, Supra. However on reflection, Respondent submits that it is the amended statute (policy) that should be primarily focused on when dealing with a religious situation whose effect is more than de minimus, such as was the case in Lynch v. Donnelly, Supra., or where the statute (policy) is justified by historical considerations, Widmar v. Vincent, supra, Marsh v. Chambers, 103 S. Ct. 3330 (1983), or such other exceptions as from time to time this Court may enunciate. Whatever the case with respect to de minimus situations, the case at bar is not de minimus. If such analysis

were adopted, then the holdings in Wallace v. Jaffree, supra, and Widmar v. Vincent, supra, could be reconciled.

The United States and the Petitioners have both used the Equal Access Act (20 U.S.C. Sec. 4071, et seq) in their Briefs in an attempt to justify a holding for Petitioners in this case. Both Petitioners and the United States concede that the Equal Access Act is inapplicable to the facts of this case, since this case was decided before the Equal Access Act was passed. What then is its relevance to this case? The United States says in its Brief (p. 2) that it is the implications of the case at bar for the Equal Access Act that are its primary consideration. The Petitioners say in their Brief (p. 34)

that facts found by Congress with respect to the maturity and impressionability of children in secondary schools should be adopted in this case.

Respondent believes that under Respondent's analysis supra, the Equal Access Act may be controlled by the case of Wallace v. Jaffree, supra. A look at the legislative history of the Equal Access Act indicates that it is almost entirely devoted to the subject of religion, and that the subject of free speech was an afterthought, perhaps in an attempt to give the statute some secular purpose or to gather enough votes for passage. However, the primary focus was upon religion. Of the U.S. Code Congressional Administrative Legislative History, No. 7, September, 1984, pp.

2349-2396 incl., almost all consideration is given to religion. Speech merits a few lines in 47 pages. Not only was the purpose almost entirely religious in nature, but the primary affect of the statute is to advance religion, i.e. get prayer back in the schools. The language of the statute reads like the District Court Opinion in the case at bar, and the statute was modeled on the District Court's Opinion. Not only is the primary effect of the Lemon test violated, but so is the excessive entanglement test for all of the reasons set forth, supra, with respect to the discussion of entanglement. Put another way, this statute could be titled the "Unequal Access Act", because of its provision saying that no teacher has to

monitor any club with the principals of whom the teacher happens to disagree (Sec. 802(d)(4)). Does that mean that when the B'Hai Club wants access to the club situation, then unless some teacher who agrees with the B'Hai principals can be found, there is no club? Respondent submits that this is exactly what will happen. Those minority religions who have very few adherents will not have access to the club system because they will have no one to monitor their club. In this day of both working fathers and working mothers, it is no answer to say that one of the parents can come in to monitor this situation. Parents, in many cases, will be unavailable as monitors. Also, the problem of the teacher taking part in the activity would be exacerbated

by having the "monitor" be an adherent of the faith involved.

II. WILLIAMSPORT AREA SCHOOL DISTRICT HAS NOT CREATED A FREE SPEECH RIGHT IN MEMBERS OF THE PROPOSED ACTIVITY TO CONDUCT ORGANIZED RELIGIOUS EXERCISE DURING THE CLUB PERIOD AT WILLIAMSPORT AREA HIGH SCHOOL.

Petitioners' position rests on two propositions.

1. That an open forum (limited) was created by the school district in the manner in which the club system was set up.

2. Having created an open forum (limited), there can be no content based discrimination against speech in that open forum.

In more stark terms, the Williamsport Area School District has created a public park for undiscriminate

student expression. This argument is unsound, because it is based on two fallacies:

1. A misconception of the purpose of the secondary public school system.

2. A misconception of what actually was done at the Williamsport Area High School by the district.

The Court of Appeals held that there was an open forum because of the principal's statement that his policy regarding proposed new clubs was that "any student activity or club which is considered to contribute to the intellectual, physical, or social development of the students and is otherwise considered legally and constitutionally proper would likely (emphasis supplied) be approved as

an officially sponsored and sanctioned school activity" (J.A. 104) 741 F. 2d at 544, 548. The Court then indicated that this standard was "so broad that virtually any program which can be said to benefit the development of the students is permissible (ibid. at 549-550). Second, no club, in the memory of the principal, had ever been denied school sponsorship until this case (ibid 543, 548). Finally, several of the activities were viewed as not being directly related to the curriculum, (ibid. at 549). These clubs were the Key Club, Chess Club, Aviation Club and Office Aides. 741 F. 2d at 549, note 18. Two of these clubs, the Key Club and Office Aides, were in existence at the time of the request for permission in this case (J.A. 120, 131

(Key Club), 141 (Office Aides)). The Chess Club and Aviation Club were not in existence, but had been permitted in the past (P. App. 8a).

While one of these clubs (Office Aides) could be described as being directly related to the commercial curriculum of the high school, the others could be described as being indirectly related to the curriculum; (Key Club-inculcation of the traditional secular values of service); (Chess Club-promotion of logical thought); (Aviation Club-inquiry into new areas of knowledge)[12]

[12]Respondents' review of the student year book, La Mamoire, beginning at 1920, indicates that the Aviation Club first appeared in 1930.

What does appear from a review of the clubs that have been permitted (J.A. 109-141) is that they are uncontroversial and not designed for advocacy. Further, they are designed to have an advisor for the purpose of education.

A. NO OPEN FORUM WAS CREATED.

The general rule is that "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated", Greer v. Spock, 424 U.S. 828 at 836, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976); Adderly v. Florida, 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966). There are two exceptions to this rule:

1. When, by long tradition of

government fiat, the property has been devoted to public assembly and debate such as public sidewalks or parks Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 45 (1983).

2. Where the State has, by its actions, made the property generally (emphasis supplied) open to the public even if it was not required to do so in the first place, Perry Education Association, supra, 460 U.S. at 45. This type of forum may be limited in the sense that it is limited to a particular group such as students. Perry Education Association, 460 U.S. at 46 footnote 7.

The first exception is not involved. The Petitioners make no argument that it is involved, and the Court

has never "suggested that students, teachers or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for... unlimited expressive purposes." Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972). Absent a public forum, the government may discriminate between partisan, political and other speech. Greer v. Spock, 424 U.S. 828 (1976). Absent a public forum, government may discriminate between commercial and other speech, Lehman v. Shaker Heights, 418 U.S. 298 (1974). This power to discriminate on a content based approach is stated in Perry Education Association, Supra., 460 U.S. at 45-47. Under this formulation, unless the forum is generally open (emphasis

supplied) and available for indiscriminate (emphasis supplied) use, 460 U.S. at 45, 47, no open forum, limited or otherwise, is created. This may otherwise be characterized as the "soap box in the park", United States Postal Service v. Counsel of Greenburgh Civil Associations, 453 U.S. 114, 131, 132 (1981).

No "soap box in the park" or a forum for indiscriminate use and generally open was created in the case at bar. First, a review of the permitted clubs indicates that they were non-controversial in nature (J.A. 109-141). Second, the clubs were also compatible with the mission of the secondary public school - education and the inculcation of traditional values. The club system as it operates at the Williamsport Area High

School can be described as made up of clubs which are non-controversial, non-divisive, are either directly related to the curriculum, teach educational skills (logical thought-Chess Club) or examine frontiers of knowledge not yet integrated into the curriculum (Aviation Club, Ecology Club). While this access is selective, it does not transform the club system to make it generally open for indiscriminate use. Perry Education Association, supra, rejected the argument that a public school system's internal mail system had become a public forum merely because certain "outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations" have used it with school officials' permission. "This type of selective access

does not transform government property into a public forum", 460 U.S. at 45, 47. Any right of access created by this selective access "would in any event extend only to other 'groups'... of similar character", 460 U.S. at 45, 48.

The basic purpose of a public secondary school is not to create a "soap box in the park". Its basic purpose is education subject to local control, Board of Education v. Pico, 457 U.S. 853, 863-864 (1982) (plurality opinion) (citations omitted), and further the inculcation of fundamental values necessary to the maintenance of a democratic political system. Thus, the Supreme Court has agreed:

> that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values" and that "there is a

> legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political." Board of Education v. Pico, 457 U.S. at 864 (plurality opinion) (citations omitted).

Pico, 457 U.S. at 864 (plurality opinion) (citations omitted). Accord, e.g., id. at 876 (Blackmun, J., concurring in part and in judgment) ("[b]ecause of the essential socializing function of schools, local education officials may attempt 'to promote civic virtues'...and to 'awake[n] the child to cultural values'") (citations omitted); id. at 889 (Burger, C.J. dissenting); id. at 896 (Powell J., dissenting); id. at 909 (Rehnquist, J., dissenting); Plyler v.Doe, 457 U.S. 202, 221-23 (1982).

Although the standard used by the principal is a broad one, it does not

indicate that the school district wanted to give up control of the club system to any speech protected anywhere by the First Amendment. This is indicated by the fact that when the first club of a controversial nature asked for permission, i.e. this case, the principal turned to the school board for direction. Secondly, the principal himself indicated that the chances for admission were only "likely" and not absolute (J.A. 104). Additionally, every other club had an advisor to give direction and advice to the club. Far from making the club system a "soap box in the park" type situation, there was and is substantial control and direction by the school district. The reasoning of the Court of Appeals that no student club had been

denied permission in the memory of the principal, 741 Fed. 2d 543, 548, is only indicative in this situation that no "soap box in the park" type of club had yet applied for permission. The hard cases have simply never been presented. However, based on what the principal did in this case (send the matter to the school board for determination) that matter would not be determined solely by the principal, but would be determined by the school board as provided by law, 24 P.S. Sec. 511.

The burden of proof that an open forum was created at the Williamsport Area High School is on the Petitioners in this case Perry Education Association v. Perry Local Educators Association, 460 U.S. 37 (1983). If they fail in that

burden, then the decision of the Circuit Court should be affirmed because Petitioners have not proved a free speech right to religious exercise in the club system at Williamsport Area High School.

The suggestion of the Petitioners in their Brief, page 17, footnote 16, that even if there is no public forum in the case at bar, nevertheless a content-based exclusion from the period is permissible only if it is reasonably necessary to further legitimate State objectives does not accurately state the law. Absent a public forum, the cases do not indicate that the State must articulate its reasons for denying access at the time of denial, or that it bears the burden of proving, particularly in an evidentury sense, that

the denial is "reasonable". See, e.g., Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 50-55 (1983); Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974); CF. Minnesota Board for Community Colleges v. Knight, 52 U.S. Law Week 4204, 4207-4210 (U.S., standard 1984). Rather, these cases indicate that the standard is the same as under ordinary equal protection or due process analysis, and the question is whether some legitimate reason for the governmental decision is reasonably apparent. The Petitioners should be entitled to summary judgment only if they come forward with some evidence that there is no unarticulated, but legitimate educational or other reason for the denial. This

Petitioners have failed to do.

The United States in its Brief at 2-3, note 3, attempts to finesse this issue with its statement that Petitioners' free speech rights "are at least as broad as their rights under the [Equal Access] Act". One wonders why Congress then went through the useless exercise of enacting it if the government is right in this contention.

B. WIDMAR v. VINCENT DOES NOT CONTROL THIS CASE.

The case of Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 770 L. Ed. 2d 440 (1981), is distinguishable from the case at bar. First, in Widmar, it was conceded that there was a public forum. The Court repeatedly stated that the university facilities had been made "generally available" for student activi-

ties and were a "generally open forum", 454 U.S. at 264, 267, 268, 269, 274, 277. Historical reasons as well as what activities were going on made the forum generally open. The forum was open to all kinds and types of discussions, including political discussion. No one was compelled to be at the university. No supervisor of the group was required. And the Court specifically distinguished the case from a high school situation on the grounds of maturity and non-impressionability.

The public secondary school system is a much more structured institution than the university. Why? Because children between the ages of fourteen and eighteen, while sophisticated in some ways simply are still immature and

impressionable. This was recognized by this Court in the Widmar case, in footnote 14, 102 S. Ct. 269, at 276. That conclusion was right when the members of this Court were youngsters; it was right when Tilton and Richardson, supra, was decided; it was right when it was set forth in the Widmar case and it is right today.

C. THE CURRICULUM-RELATED STANDARD OF THE COURT OF APPEALS IS NOT THE STANDARD FOR DETERMINING WHETHER AN OPEN FORUM HAS BEEN CREATED.

The reasoning of this Court in the case of Perry Education Association, supra, is set forth in A of this part of the Brief. There is another significant reason for not burdening public education in the secondary and elementary schools with a curriculum-related standard for allowing a club

activity to exist. That is the fact that there are educational skills which are not taught as a subject for credit in the curriculum. With the expansion of knowledge in the world today, there is hardly time for the teaching of subjects of knowledge, let alone having a separate class for the development of educational skills. It would be a great loss to education if clubs like the Chess Club could not be permitted without creating a "soap box in the park" situation in the public schools. Already schools in this country are closing down their activity periods to solely curriculum-related subjects. What does this say for the future, as new areas of knowledge become known, but not curricularized in the subject matter of a high school education? The choice of a

"soap box in the park" atmosphere or a strictly curriculum-related activity period is a Catch 22 situation for education. Respondent has been involved in the intricacies of trying to make additions and changes to curriculum. These things do not occur without great thought, planning and considerable expenditure of time. When Respondent first was elected to the school board, he found that from conception to implementation of an idea, it took approximately six years. This time span has been shortened somewhat since 1973, but it is a wrenching experience for school administration. To deprive children of new frontiers of knowledge via clubs simply because there is not yet a curriculum subject concerning that area of

knowledge, is not only anti-education, but lacking in wisdom. On the other hand, if Petitioners are right, then the choice is between curriculum- relatedness on the one hand and a "soap box in the park" atmosphere on the other. No matter what happens, education loses.

III. THE ALTERNATIVE SUGGESTED BY PETITIONERS FOR PERMITTING THE ACTIVITY WOULD NOT ALTER THE VIOLATION OF THE ESTABLISHMENT CLAUSE PRESENT.

Petitioners suggest that a sign on the door disclaiming any intent to advance religion. This solution, if it weren't met with laughter, would put the school district in the position of dissembling, because advancing religion is exactly the purpose of the activity, and with the Equal Access Act now law, the perception of students, both objec-

tively and subjectively, would be that the assertion was patently untrue. Petitioners argue that education is a wholesome alternative to censorship (Petitioners' Brief, page 43), but education concerning the intent of the government with respect to religious clubs, if it implied that there was no intent to aid or advance religion would be untrue, and therefore very unwholesome. Petitioners also have never requested an alternative based on education. The suggestion of the Petitioners (Petitioners' Brief, page 43), that no monitor need be required, eschews the liability problems associated with a lack of supervision during school hours.

Finally, the school district in this case offered the alternative which

has been approved by this Court of released time. Zorach, supra. To suggest that somehow released time amounts to hostility to religion under the circumstances of the case at bar, is unfair both to religion and to the school district. Alternatives were considered by the District Court, although the District Court did not impose a monitor on the activities of the club as opposed to an advisor. (P. App. 99a, 100a).

The suggestion of the Petitioners that the burden under the Establishment Clause was placed on Petitioners is not supported by any discussion and therefore cannot be responded to, except to say that for the reasons set forth in Argument I above, Respondent does not believe that the bur-

den was placed on Petitioners in this case.

IV. ASSUMING THAT AN OPEN FORUM WAS CREATED, THE COURT OF APPEALS' REASONING WITH REGARD TO RESOLVING THE CONFLICT BETWEEN THE FREE SPEECH AND ESTABLISHMENT CLAUSES SHOULD BE ADOPTED.

In the Zorach v. Clossun case, supra, this Court held that where Establishment Clause problems and free exercise of religion problems co-existed, they could be resolved by providing an alternative for the free exercise of religion. This was the released time concept. Thus, there is a basis for resolving any conflict between two constitutional clauses because of the alternative opportunities available for the resolution of one or the other problems. There is no evidence of any intent on the part of the Williamsport

Area School District or anyone else to prevent the free exercise by Petitioners of their religion. In fact, accommodation has been made to provide for just such exercise. This accommodation also provides for speech, religious speech, for Petitioners. Thus, the Appellate Court was correct in its Resolution of the conflict between the free speech and establishment of religion clauses, if this Court holds that an open forum generally open for indiscriminate speech was created and that the Establishment Clause is also violated.

Finally, if the Establishment Clause issue is resolved in the Respondents' favor, Respondent urges the Court to also resolve the free speech issue. School districts need to know

where they stand on this matter. Many school districts, if they were presented with the Catch 22 choice of allowing the Nazi Club or limiting the clubs to purely curriculum-related clubs, would choose the later. This would do great harm to education. The issue is fairly presented in this case, although Respondent concedes that a decision on either issue in Respondents' favor would effectively affirm the Circuit Court of Appeal's conclusion.

CONCLUSION

The judgment of the Court of Appeals that the proposed activity not be permitted should be affirmed on two separate grounds:

1. That permitting the activity would violate the Establishment Clause.

2. That an open forum was not created under the circumstances in the case at bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that 40 copies of the within Brief for Respondent on Writ of Certiorari to the United States Court of Appeals for the Third Circuit has been served upon the Supreme Court of the United States by placing same in the U.S. Mail, first class, postage prepaid on the 28th day of June, 1985.

The undersigned also certifies that 3 copies of the within Brief has been served upon Samuel Ericsson, Esquire, Christian Legal Society, 6901 Braddock Road, Springfield, Virginia, 22151, by placing same in the U.S. Mail, first class, postage prepaid, the 28th day of June, 1985.

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No. 84-773

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MICHAEL BENDER, *et al.*,
Petitioners,
v.
THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MICHAEL BENDER, *et al.*,
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REPLY BRIEF FOR PETITIONERS

The facts of this case are straightforward. A small group of high school students wish to meet to discuss religious ideas, pray, and read the Bible at a time when all other students have the opportunity to pursue their various interests. Permission to meet was withdrawn solely because the school board attorney advised the school officials that permitting a student meeting for religious speech would violate the Establishment Clause.

This reply brief is necessary because respondent asks this Court to depart from its precedents. Also, many arguments made by respondent and *amici* supporting re-

spondent are at variance with the record in important respects.

ARGUMENT

I. Respondent asks this Court to depart from its precedents in four major ways.

A. Respondent urges this Court to adopt a fundamental misinterpretation of the First Amendment: That the First Amendment does not provide equal protection for citizens' religious speech but instead requires state discrimination against citizens' religious speech. This "compelled discrimination" argument has repeatedly been urged upon this Court, only to be rejected each time as antithetical to the correct understanding of the First Amendment. *See Widmar* v. *Vincent*, 454 U.S. 263 (1981); *McDaniel* v. *Paty*, 435 U.S. 618 (1978); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *see also*, Pet. Br. at 14 n.13 (remarkable number of important speech cases involve religious speech).

B. Respondent attempts to justify this oft-rejected theory by alleging that high school students are incapable of correctly perceiving equal access as state neutrality. Respondent asks this Court to adopt a view of high school students that is contrary to federal court precedent, established educational practice, congressional findings, and the facts of this case. *See* Pet. Br. at 12-15, 27-36.

This Court and the lower federal courts have recognized that high school students are able to observe other students' controversial expression without misperceiving school endorsement. *See Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969); *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *see also*, Pet. Br. at 12-15; 29-31 (lower court rulings). *Cf., School District of Abington* v. *Schempp*, 374 U.S. 203, 225 (1963) (objective study of Bible in school curriculum does not imply state endorsement of its

religious teachings); *Board of Education* v. *Pico*, 457 U.S. 853 (1982) (plurality opinion) (availability of controversial materials in school library with which school does not agree upheld).[1] The Congress passed the Equal Access Act based on its factual findings that high school students could make such a distinction.

This case is unlike those cases in which the Court has considered student perception as a factor in finding an Establishment Clause violation. In those cases, student perception of state endorsement has been accurate, as when the state has initiated religious inculation as part of the curriculum (*see Schempp, supra*; *Engel* v. *Vitale*, 370 U.S. 421 (1962); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948)), or legislated a moment of silence

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[1] Religious ideas may be, and are, discussed in history, literature, philosophy, science, and other classes that deal with important ideas or values. *See, e.g., Schempp*, 374 U.S. at 225. Such materials have not been discarded because of a remote possibility that some student may misunderstand the state's neutrality in regard to the religious ideas presented. The presumption has been that high school students are able to distinguish the presentation of religious ideas from state endorsement of those ideas. *See, e.g., id.*; *Grove* v. *Mead School District*, 753 F.2d 1528, 1539-41 (9th Cir. 1985) (Canby, J., concurring) (high school students understand that curricular material referring negatively to religion or profanely to Jesus Christ does not convey governmental endorsement of those religious views).

In fact, the National Education Association has stated that "the survival of democracy requires that every state maintain a system of free public education that prepares its citizens to . . . [r]ecognize the cultural, social, political, and religious differences found throughout the world." *The Resolutions of the National Educational Association of the United States 1984*, Section A-2. Psychological evidence indicates that high school students possess the cognitive capacity necessary to form their own ideas, to disagree with the views of peers and authority figures, and to establish the personal ideals and values of self-identity. *See* Note, *The Constitutional Dimensions of Student-initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983).

for the specific and sole purpose of encouraging religious activity (*Wallace* v. *Jaffree*, No. 83-812 (June 4, 1985)),[2] or spent substantial amounts of money to provide instruction in religious schools (*School District of Grand Rapids* v. *Ball*, No. 83-990 (July 1, 1985)).

High school students are repeatedly exposed to materials and discussions, both curricular and extracurricular, that demonstrate they are not spoon-fed material to learn by rote, but are expected to think critically about their lives and the society around them. "[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Pico*, 457 U.S. at 868 (plurality opinion).

Indeed, the Williamsport school officials, the educational experts closest to the students, have judged that high school students should be allowed to form their own groups to pursue a variety of interests. The school officials, therefore, would seem to have concluded that students are able to recognize that the groups formed reflect the students' interests and not necessarily the views of the school. P. App. at 19a; *id.* at 49a (Adams, J., dissenting).

A primary educational mission of a high school is to ensure that students have a *proper* understanding of the Bill of Rights as they begin to participate in our democratic process. To prohibit freedom of speech to these

---

[2] In *Jaffree*, solely for religious purposes, the state attempted to initiate a devotional religious activity as part of the school curriculum. In direct contrast, this case involves only student-initiated, student-led extracurricular religious speech, as in *Widmar*. *See* Pet. Br. at 19-20.

students is to substitute censorship for education precisely where education should occur.

C. Respondent asks this Court to focus its "primary effect" inquiry solely on the one group seeking to meet for religious speech rather than on the entire activity period during which twenty-five other student groups meet. This is precisely the approach repudiated in *Widmar*. 454 U.S. at 273. The relevant issue is whether an objective observer would perceive equal access as state endorsement of, or state neutrality toward, these students' religious speech. *Cf.*, *Jaffree*, slip op. 10 (O'Connor, J., concurring in the judgment); *Widmar*, 454 U.S. at 274 n.14.

The Williamsport High School activity period is open to any student activity that contributes "to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper." P. App. A at 9a; J.A. 65, 67, 90, 103. More than twenty-five student organizations currently meet during the activity period, and the potential number of groups is limited only by the number of students who wish to exercise the option of forming a group. P. App. A at 8a; P. App. C at 81a, 91a. The high school has never denied any other student group permission to meet. *Id.*

The courts below repeatedly emphasized both the complete voluntariness of the students' decisions to initiate and participate in any of a broad range of activities and the neutrality of school officials in the students' selection of activities. P. App. A at 8a, 18a-20a; P. App. C at 96a. Before every activity period, each student decides which activity, if any, to attend that particular day and must choose to leave the homeroom if he or she wishes to attend one of the twenty-five activities. P. App. A at 55a (Adams, J., dissenting).

Thus, as in *Widmar*, there is no reasonable inference that the state endorses these students' religious speech.

The activity period is available to a broad class of speakers, a few of whom engage in religious speech. Equally important, the number of groups indicates, and the record confirms, that the decision of each student to attend a particular group, or not to attend any group, is made without interference from school authorities. A weaker case for finding an impermissible message of state "endorsement" of religion is difficult to imagine.

D. Respondent's "compelled discrimination" theory creates the very excessive entanglement prohibited by the decisions of this Court. As in *Widmar*, excessive entanglement would result if school administrators are required to perform the "impossible task" of "determin[ing] which words and activities fall within 'religious worship and religious teaching.'" 454 U.S. at 272 n.11. For example, in some years, Williamsport High School has offered a course entitled "Literature of Western Religions." J.A. 87. If a student group formed during the activity period to discuss topics raised in that class, the school administrator would be hard-pressed to distinguish it from these students' group on a constitutionally principled basis. The same is true for a philosophy or ethics group. *Cf.*, *Tinker*, 393 U.S. at 516 (Black, J., dissenting) (facts indicate religious motivation behind students' speech). *See* amicus curiae brief of Ad Hoc Group of State Education Officials, School Administrators and School Board Members (Br. 2, 7, 9-11) (exclusion of students' religious speech creates irresolvable dilemma).

II. Many arguments of respondent and *amici* supporting respondent are at variance with the record. Only the most important will be discussed here.

A. The discretion of high school officials is not at issue in this case. Thus, the Court need not explore the parameters of high school students' free speech rights in order to decide this case.

As the record makes clear, the students were initially given permission to meet. The sole reason for with-

drawal of permission to meet was the opinion of the school board attorney that the Establishment Clause prohibited students meeting for religious expression on public school property. Pet. App. C at 84a. The decision to exclude them was not made for curricular, educational, or disciplinary reasons. P. App. A at 18-20; P. App. C at 83a-84a; J.A. 68, 84-85. As the school board explained to the students, "neither the School Board nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property." J.A. 48-49.

B. Contrary to the assertions of *amici* American Civil Liberties Union, et al. (Br. 24 & n.10), and American Jewish Congress, et al. (Br. 15, 28), school policy does *not* require teacher participation in a student group. P. App. A at 9a, 26a-27a; J.A. 83, 143-44.[3] Furthermore, a teacher did *not* participate in the content of these students' meetings. *Id.* In the initial meeting and the meetings during the 1983-84 term, the teacher took attendance and then sat apart from the students to do his own work. *Id.* This has always been undisputed.

Teachers are capable of functioning solely as monitors to perform incidental "housekeeping" tasks, i.e., to take attendance and be available in an emergency. Teachers in public schools must walk a fine line every day in dealing with topics such as comparative religion, history, literature, philosophy, and science, which sometimes touch on religious values and issues. The law assumes a teacher can be neutral in a public school curricular setting. *Schempp*, 374 U.S. at 225 (teaching religion objectively); *Epperson* v. *Arkansas*, 393 U.S. 97

[3] The students have never wanted a teacher to participate in their meeting. If the mere presence of a teacher were troubling, a teacher could sit outside the cafeteria door, close enough to respond to an emergency but otherwise entirely removed from the meeting.

(1968) (teaching science). The same teacher can be neutral in an extracurricular setting when he or she is not participating in the content of a meeting but merely performing "housekeeping" tasks.[4]

Quite to the contrary, excessive entanglement will be created if religious speech must be excluded. *See supra*, p. 6.

C. The suggestion by *amici* American Civil Liberties Union, et al. (Br. 7 & n.5), that this Court remand this case to the district court for reconsideration under the Equal Access Act lacks merit. Regardless of any district court conclusion on remand as to the applicability of the Act in this case, the court of appeals' rationale prohibits the students' religious speech during the activity period, whether their claim is based on the Constitution or an act of Congress. P. App. at 43a n.30.[5]

---

[4] This case does not involve the supervision and monitoring problems that are present when public school teachers enter private religious school classrooms or where private school teachers are government subsidized, the salient features of the programs struck down by this Court on "entanglement" grounds. *Aguilar* v. *Felton*, No. 84-237 (July 1, 1985), slip op. 10; *id.* at 2 (Powell, J., concurring); *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971). In the words of this Court, "[i]t can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state." *Wolman* v. *Walter*, 433 U.S. 229, 248 (1977).

[5] The lower federal courts are continuing to wrestle with the issue of equal access for students' religious speech. *See Amidei* v. *Spring Branch Independent School District*, No. H-84-4673 (S.D. Tex., April 26, 1985) (Equal Access Act requires high school to allow student group to meet for religious speech when other students allowed to meet); *Mergens* v. *Board of Education of Westside Community Schools*, No. CV 85-0-426 (D. Neb., May 23, 1985) (denial of preliminary injunction to high school students seeking equal access under the Act); *Bell* v. *Little Axe Independent School District No. 70*, 766 F.2d 1391 (10th Cir. 1985) (holding religious group meetings at elementary level unconstitutional, noting the inapplicability of the Equal Access Act below secondary level); *Commack School Dist.* v. *Rossi, et al.*, No. CIV-85-1288 (E.D.N.Y. 1985) (school district suing for declaratory judgment).

D. The insinuation of respondent that the students sought permission to meet out of a desire to have state endorsement is unsupported by the record. As in *Widmar*, the school requires that students request permission to meet, which is an understandable, content-neutral manner restriction. J.A. 71. Furthermore, as the record makes clear, the purpose of Petros is mutual support. They do not seek to impose their views on others. *See, e.g.*, J.A. 16, 18; Pet. Br. at 13 n.8.[6] The students do not want state endorsement; they just want to meet.

E. Respondent asserts that religious speech would dominate the forum at Williamsport High School, which is not true. This Court can reserve the question of forum domination in the event it should arise elsewhere, just as it reserved the question in *Widmar*. 454 U.S. at 275. This Court should not decide that these students' speech is unconstitutional *per se* because of hypothetical problems not presented here.

Most high school students do not choose to spend their valuable free time reading the Bible and praying. Over 98 percent of the students at Williamsport High School have chosen not to attend these students' meetings, either in their initial meeting or during the 1983-84 school year. Instead, a small minority of students have become the only group denied permission to meet during the activity period, solely because their speech is religious. If these students are prohibited from meeting, the message that the state sends is clear: it is a message of censorship, not neutrality. Students whose personal conduct is otherwise exemplary will be disciplined solely for expressing their religious values and ideas at a time when other students are allowed to express themselves.

The vast majority of school administrators are like the school principal here: They want to do what is legal

---

[6] If the students sought to meet to impose their views on others, they would not have agreed to forego use of the school media.

but they are not always sure what that is. The First Amendment does not permit the state to require or favor religious speech by high school students, but neither does it require the state to censor high school students' religious speech. It is a critical distinction upon which these students' liberty depends.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL BENDER, *et al.*,
Petitioners,
v.
THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF OF PETITIONERS

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MOTION OF PETITIONERS TO FILE POST-ARGUMENT BRIEF

Pursuant to Rule 35.6 of the Rules of this Court, Petitioners Bender, et al, move for leave to file a post-argument brief.

Upon oral argument, it became evident that the briefs of the parties (including movants) had not adequately addressed the threshold issue of Respondent's standing to appeal from the judgment of the district court. To assist the Court in its decision, Petitioners believe that a short post-argument brief will prove helpful.

Wherefore, movants respectfully request that their motion for leave to file the following post-argument brief be granted.

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POST-ARGUMENT BRIEF OF PETITIONERS

ARGUMENT

This supplemental brief addresses two issues of justiciability—mootness and standing. These matters were noted in the Petition for Certiorari, Cert. Pet. at 8-9, n.7, and also in Petitioners' Brief, Pet. Br. at 8, n.7. They were not treated at length therein as the parties are not opposed on these points. In view of some questions raised by the Court during oral argument, Petitioners submit this brief to further clarify their position.

I. Mootness

A. The question of mootness must be distinguished from the question of standing. The crux of the jurisdictional issue now being raised is whether Respondent

Youngman had *standing to appeal* from the decision of the district court. The court below concluded that Mr. Youngman had standing to appeal. If he did not, the court of appeals would then have lacked jurisdiction to hear his appeal and its decision would have been invalid.[1] If that were the case, this Court should vacate the opinion of the court of appeals and reinstate the decision of the district court.

United States v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950) is inapposite. The rule of *Munsingwear* requires that all lower court opinions be vacated if a case has become moot. There is no rule suggesting that a case is moot simply because a lower court opinion is vacated for some other reason (e.g., the rendering court lacked jurisdiction).

The question of Respondent Youngman's standing to appeal is distinct from the question of mootness. If Mr. Youngman's standing to appeal were thought to be based on his school board membership (a premise we think inaccurate), the loss of such membership might create the impression that the case itself had become moot. In fact, however, Mr. Youngman would only have lost whatever *standing* to appeal he might have possessed solely by virtue of being a member of the school board. Under such a view, Mr. Youngman would no longer be able to maintain the appeal in that capacity, and the court of appeals would have lacked proper parties to retain jurisdiction of the appeal. The case would not thereby be *moot*; it simply would be *over*, the students having prevailed in the district court and no proper party appealing that judgment. The relief ordered by the district court against the school board would stand, just as any unappealed district court judgment stands.

---

[1] If the court of appeals had jurisdiction, this Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

For reasons explained below, however, we believe Mr. Youngman's *standing to appeal* is not based on his school board membership but on his status as a parent of children attending Williamsport High School. *Infra* at 4-5.

B. A controversy of constitutional dimensions continues between the Board and the students, affecting "the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937). Nothing has changed in the relationship between the school board and the students to render this case moot. The Board continues to rely on the judgment of the court of appeals as its basis for banning the student meetings and for opposing an award of attorney fees. Cert. Pet. App. D 109a-112a; J.A. 146-148.[2] The Board's limited interest in complying with the law[3] thus places it at odds with the legal interests asserted by the students. A final judgment in this litigation is needed to determine the respective legal rights of these parties. At present, the Board will not allow Petros to meet. Should this Court reverse (or even vacate) the judgment of the court below, the Board would allow Petros to meet.

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[2] We do not suggest that the Board has acted in bad faith. On the contrary, the Board may be correct in its assertion that it is bound in some sense by the judgment of the Third Circuit notwithstanding the fact that it was not the appealing party. *Cf. Smuck* v. *Hobson*, 408 F.2d 175, 180-181 (D.C. Cir. 1969) (*en banc*).

[3] The Board's interest is similar to that of an interpleader or stakeholder filing a "Bill of Peace." *Cf. Commack School Dist.* v. *Rossi, et al.*, No. CIV-85-1288 (E.D.N.Y. 1985) (school district, faced with competing claims, suing for declaratory judgment). Here, the Williamsport School Board has asserted no stake in the "fund" as such (it purports to be indifferent to whether Petros meets) but only in complying with the law and thereby avoiding multiple liability. While the Board's interest in the "fund" may be satisfied whatever the court decides, the case itself is not moot until the claims of competing claimants to the "fund" are finally resolved.

II. Standing

Petitioners did not challenge the standing of Mr. Youngman in the Third Circuit. We believe that Mr. Youngman was an appropriate party to maintain the appeal, not by virtue of his board membership[4] but by virtue of his status as an objecting parent who at all relevant times had children attending Williamsport High School. Clearly, if the school board attorney had decided in the first instance that Petros could meet, Mr. Youngman would have had standing to complain of such a policy. *See, e.g., Wallace* v. *Jaffree*, slip op. No. 83-812 at 3-4 (June 4, 1985); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963); *McCollum* v. *Board of Education*, 333 U.S. 203, 205 (1948). The situation on appeal to the Third Circuit was not meaningfully different. Mr. Youngman's position was that the Board, by failing to appeal, was inadequately representing his interests as a parent opposed to the Petros meetings. *See* Brief for Respondent at 6, n.3. *Cf. National Wildlife Federation* v. *Gorsuch*, 744 F.2d 963, 969-970 (3rd Cir. 1984); *Smuck*, 408 F.2d at 181.

Mr. Youngman would have had a right to intervene in the litigation to defend this interest. *Smuck*, 408 F.2d at 178-182; *see United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395, n.16 (1977) (citing *Smuck* with approval); *Legal Aid Society at Alameda County* v. *Brennan*, 608 F.2d 1319, 1328 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). While it otherwise might have been preferable for a parent to file a formal motion under Fed. R. Civ. P. 24 to intervene as a party defendant for purposes of prosecuting an appeal, such a motion would have been a redundancy for Mr. Youngman, who was

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[4] We question whether Mr. Youngman ever had standing to appeal in his capacity as a school board member. The Board as a body voted against taking an appeal. *See Smuck*, 408 F.2d at 177-178; *cf. Snyder* v. *Buck*, 340 U.S. 15 (1950). Mr. Youngman's proposed substitution of a successor board member likewise seems irrelevant.

already joined as a party defendant and sued individually. Indeed, it would seem technically impossible to intervene if one is already a party.

Moreover, had Mr. Youngman not appealed, he likely would have been collaterally estopped from challenging, as a parent, the acquiescence of the school board in the judgment of the district court. *See Gorsuch*, 744 F.2d 963; *Brennan*, 608 F.2d at 1328, n.9; *cf. Smuck*, 408 F.2d at 182. The preclusive effects of such a judgment would seem especially strong in actions like this one, which states a claim for, *inter alia*, declaratory relief.

At all events, Petitioners believed Mr. Youngman had standing to appeal and that the judgment of the district court was to be defended on the merits. Should this Court conclude otherwise and hold that Mr. Youngman lacked standing to appeal, the proper result is to then reinstate the judgment of the district court allowing Petros to meet.

Respectfully submitted,

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ON WRIT OF CERTIORARI
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FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Does the decision of the United States Court of Appeals for the Third Circuit which both reversed the U.S. District Court for the Middle District of Pennsylvania and upheld Williamsport Area School District's refusal to permit a student-initiated religious group, Petros, access to the facilities of Williamsport Area High School during an established activities period on an equal basis with non-religious groups violate the First, Fifth, and Fourteenth Amendments to the Constitution of the United States?

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Pursuant to Rule 36.2 of the Rules of this Court, the organizations named above file this brief in support of Petitioners. Consent for the filing of

this brief has been obtained in writing from the attorneys of record for the parties in this case. Their original letters have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The amici are four nonprofit religious organizations which have a continuing, vital interest in preserving religious liberties under the Constitution.

The Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention,

Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members and reflect the traditional Baptist concern for proper church-state relations. The Baptist Joint Committee has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ." Among Baptists, religious liberty is a fundamental and sacred principle.

The National Association of Evangelicals, located in Wheaton, Illinois, is a nonprofit association of evangelical Christian organizations, colleges and universities, as well as some 44,000 churches from 78 denominations. It serves a constituency of 10 to 15 million people through its commissions and affiliates, such as the National

Religious Broadcasters.

The National Council of the Churches of Christ in the United States of America is a federation of thirty-three Protestant and Eastern Orthodox religious bodies in the United States with aggregate membership totaling approximately 43,000,000. It is governed by a General Board of 250 members chosen by the member denominations in proportion to their size and support. The General Board determines the policies of the organization through debate, amendment and adoption of carefully-prepared statements and resolutions brought to it by its subordinate program divisions. Several of these policies affirm the principle of religious liberty, and it is on the basis of these policies that we enter this case.

The Presbyterian Church (U.S.A.) is a national, Christian denomination with churches in all 50 states. It has

approximately 3,150,000 active members and approximately 11,750 congregations organized into 195 Presbyteries and 20 Synods. The General Assembly is the highest governing body of the Church, meets annually, and is composed of approximately 600 delegates elected by the Presbyteries, known as commissioners, one-half of whom are ordained ministers, the other half ordained lay officers known as ruling elders. This brief does not purport to reflect the views of all members of the Church, but is based upon policies decided by the General Assembly or incorporated into the Constitution of the Church by vote of the Presbyteries.

Amici bring special expertise to the case at bar as a result of their participation as amicus curiae in Widmar v. Vincent, 454 U.S. 263 (1981), and their work to secure passage by Congress of The Equal Access Act, P.L. 98-377, which

guarantees rights of free speech and association of students in public secondary schools.

Amici assert that the principle of religious liberty as guaranteed by the First Amendment to the Constitution of the United States is at issue in and could be put in jeopardy by the case at bar.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment V, in part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Constitution, Amendment XIV, in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Amici adopt and incorporate by reference the statement of the case as it appears in the brief filed by Petitioners.

There are, however, certain uncontested facts which amici wish to emphasize. In Bender v. Williamsport Area School District, 563 F.Supp. 697 (1983), the court quoted from the affidavit of Wayne E. Newton, Principal of the Williamsport Area High School, concerning the granting of permission to student clubs to meet during the 7:57 a.m. to 8:27 a.m. activities period. Newton stated: "Activities and clubs which promote the intellectual, physical and

social development of students have been approved as officially sanctioned student activities, permitted to meet during the school day, i.e. the activities period. . . ." 563 F.Supp. at 700, fn. 5. A student-initiated religious group calling itself Petros -- which wanted to use the activities period to read scriptures, pray, discuss religious questions, and engage in other activities of interest to the group -- asked that it be given permission to meet during the activities period and was denied permission -- the only group which had ever sought and been denied permission to meet as a sanctioned student activity.

The students exhausted their remedies by successive appeals through school channels before they brought this cause of action in the United States District Court for the Middle District of Pennsylvania. That court decided that,

under the specific fact pattern in this case, religious and secular clubs should have equal access to the use of school facilities because the school had created a limited open forum when it established an open activities period. The United States Court of Appeals for the Third Circuit reversed, concluding that First Amendment establishment clause concerns expressed by the school district must prevail over a First Amendment free speech right of the students. That decision is on appeal in the instant case.

Correlative to the fact pattern of the instant case is congressional enactment of P.L. 98-377, The Equal Access Act, after the decision of the United States Court of Appeals for the Third Circuit in the case.

SUMMARY OF ARGUMENT

Amici argue herein that under the facts in the case at bar, which are constitutionally indistinguishable from the facts in Widmar, supra, 454 U.S. 263, permitting Petros to meet during the student activities period would not be state action constituting an establishment of religion. To the contrary, refusing the students permission to meet impermissibly burdened their free exercise, free speech and equal protection rights. Further, amici argue that it is bootstrapping to claim the establishment clause as a compelling state interest under the free exercise clause or the free speech clause.

ARGUMENT

PREAMBLE

Though the Declaration of Independence and the works of many responsible scholars assert that natural rights exist, constitutional jurisprudence in the United States rests on an assumption that substantive individual and corporate rights are products of limitations on government power. Hence, the Bill of Rights begins with the phrase, "Congress shall make no law...." Through a series of cases the Supreme Court has held that the phrase in the Fourteenth Amendment "nor shall any State deprive any person of life, liberty, or property, without due process of law" has made the First Amendment limitations applicable to the states. Cantwell v. Connecticut, 310 U.S. 296 (1940) (religion clauses); Gitlow v. New York, 268 U.S. 652 (1925), Whitney v. California, 274 U.S. 357

(1927) (speech and press); DeJonge v. Oregon, 299 U.S. 353 (1937) (assembly and petition).

The First Amendment is couched in absolute terms. However, the limitations which this Amendment places on all levels of government are not absolute. The absoluteness of the words of the establishment clause has been tempered by judicially-established tests for determining the state action which, in fact, constitutes establishment. See, Lemon v. Kurtzman, 403 U.S. 602 (1971). Courts have permitted some burdening of the free exercise of religion where a state can demonstrate a compelling interest for doing so and can show that such an interest cannot be served by less restrictive means. See, Wisconsin v. Yoder, 406 U.S. 205 (1972). The compelling interest test is also applicable to the free speech clause of the First Amendment. See,

Schenck v. United States, 249 U.S. 47 (1919).

There are tensions between the First Amendment's establishment and free exercise of religion clauses. See, Walz v. Tax Commission, 397 U.S. 664, 668 (1970). There are similar tensions between the religion clauses and the other First Amendment clauses. The tensions which exist between the religion clauses and the free speech clause may require that the courts employ a difficult balancing of rights. However, there is nothing either specific or inherent in the First Amendment that either requires or allows a state to make decisions on the permissibility or impermissibility of speech in public secondary schools solely on the basis of the religious content of that speech.

The establishment clause may forbid religious speech in public schools under

specific circumstances. But the circumstances -- the facts of the case -- are dispositive. Under the narrow facts of the case at bar the First Amendment does not provide grounds for limiting the religious speech which Petros sought. The Williamsport Area High School and its school board, by limiting and even denying the speech of Petros solely on the basis of religious content, made discriminations not permitted by the First Amendment.

I.

The establishment clause does not require that Petros be denied equal access to the use of the facilities at Williamsport Area High School.

The Supreme Court in Lemon, supra, at 612, 613, spelled out three tests for determining when state action constitutes an establishment of religion. Amici assert that an approval of Petros' request for the status of a school-

sanctioned student club would not fail any of the tests. Our assertion, analyzed below, is bolstered by Widmar, supra, at 271, "It does not follow . . . that an "equal access" policy would be incompatible with this Court's Establishment Clause cases." Enactment of P.L. 98-377, The Equal Access Act, after the decision of the United States Court of Appeals for the Third Circuit in the instant case further bolsters our assertion. The substantial majorities in both houses of Congress attest to their independent determination that "equal access" as embodied in that statute, which closely tracks the Williamsport fact pattern, is constitutional.

1. The secular purpose test: Despite the fact that the Supreme Court's opinion in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 512 (1969), can be read to

imply that all public schools are open forums, amici do not agree that such is the case. We do not believe that a public school can be an unlimited open public forum by its very nature.

However, we assert that some public schools can have created within them limited open forums. There are distinct differences between elementary and secondary schools. Primarily because of the immaturity of elementary school students and both the nature and the rigid structure of an elementary school curriculum, it is unlikely that a limited open forum would be created in an elementary school through actions of teachers, administrators or school boards. However, a higher degree of maturity in secondary school students and a more flexible secondary school curriculum make it entirely possible for administrators or a school board to create a limited open forum in a

secondary school.

The facts in the instant case demonstrate that a viable, diverse and highly visible limited open forum for student organizations had been established by the Williamsport Area High School well before Petros sought permission to become part of that forum. The Williamsport forum was created for all student groups which would "contribute to the intellectual, physical or social development of the students" [741 F.2d 538 (1984), at 544]. Non-religious student groups had participated in that forum for a number of years before Petros sought to be included. It is clear that the Williamsport forum, like the forum in Widmar, supra, at 273, where a University had opened its facilities for use by student groups, was not created for religious purposes; it was created for purely secular purposes. Hence this

constitutional test has been satisfied.

2. The principal or primary effect test: This test requires that the principal or primary effect of state action must neither advance nor inhibit religion. Lemon, supra, at 612. Rather government is limited to "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Walz, supra, at 669. See also, Epperson v. Arkansas, 397 U.S. 97, 103, 104 (1968). This Court in its Widmar, supra, decision indicated that dominance of the open forum is a key factor when at 275 it held that, so long as the religious group did not dominate the open forum at the University of Missouri at Kansas City, "advancement of religion would not be the forum's 'primary effect.'" The record is void of empirical evidence that Petros would dominate Williamsport Area High School's

limited open forum. Only 45 students attended the lone Petros meeting allowed by the school's administration -- clear evidence that this group was not going to dominate the forum. If anything, such a small number of interested students is counterindicative of any dominance whatsoever.

Respondents have asserted that Widmar is irrelevant to the case at bar because Widmar dealt with a college situation versus a secondary school situation in the instant case. Previous decisions of this Court clearly indicate that the Widmar and Williamsport Area High School situations are analogous. In Tinker, supra, at 512, -- a secondary school case -- this Court quoted Justice Brennan speaking for the Court in Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589, 603 (1967). Justice Brennan characterized

the Keyishian university community as a marketplace of ideas in which future leaders are trained "through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" The Court then directly applied Justice Brennan's description of a university as an open forum to that type of forum it saw existing in a (Tinker) secondary school.

Just as in Tinker the Court found no difference of constitutional dimensions between the First Amendment rights of college and high school students, so here, too, there is no difference of constitutional dimensions between the rights of the students in Widmar and in the Williamsport Area High School.

The Supreme Court has made distinctions between elementary and secondary

school students on one hand and college students on the other, see, Tilton v. Richardson, 403 U.S. 672 (1971), Roemer v. Maryland, 426 U.S. 736 (1976), based largely on differences in maturity levels of the two groups of students. To treat all students from kindergarten through grade 12 as a homogeneous group is unreasonable; but it is reasonable to assume that secondary school students have sufficient maturity to understand the difference between a secondary school sanctioning a group such as Petros, along with numerous other student-initiated groups, versus either sponsoring or promoting that group. According to Concise Oxford Dictionary, 1983 edition, to "sanction" means to "express authoritative permission." It does not mean approval, promotion or support. High school students are mature enough to understand that. They did understand it

in Williamsport Area High School.

To argue that sanctioning the inclusion of Petros in an existing limited open forum would communicate state approval of religion because the students are required by law to be in the school building is to muddy the distinction between state action and individual action. State compulsory attendance laws place all Williamsport students in homeroom. There state action ends on activity period mornings. A student's individual freedom of choice then takes over. The facts in Williamsport are not those of Engel v. Vitale, 370 U.S. 421 (1962), and Abington v. Schempp, 374 U.S. 203 (1963).

In the latter, religious activity was the only activity scheduled for the students; it was set up and directed by school authority; the only "voluntary" individual (student) action was

conspicuously leaving the activity if compelled by conscience. In contrast, at Williamsport Area High School "the lack of en masse activity together with the more varied alternatives reduces any perception of state approval or student embarrassment." Williamsport, supra, 563 F.Supp. at 713.

Amici assert the truly voluntary existence of the religious activity (Petros) and the truly voluntary nature of a student's choice to leave homeroom in Williamsport Area High School. Amici both agree with and adopt Judge Adams' position as set forth in the appellate court's dissent that "in view of the voluntariness of a student's decision to attend a specific activity, the fact of compulsory attendance is irrelevant." 741 F.2d at 566.

Moreover, there is a constitutionally significant difference in the role

played by Engel and Schempp teachers and the role of the Williamsport teacher/monitor. The mere presence of an adult monitor (teacher or otherwise) in a nonparticipatory capacity, to take roll and ensure order, does not communicate government endorsement, promotion or sponsorship of religion.

The argument that the action of Williamsport Area High School in providing a heated and lighted room for Petros would constitute state support of religion is without merit. The Williamsport school day has begun when the activities period takes place. The building is open, it is heated, and the lights are on. Public support, if any, of Petros would be de minimis. "No perfect or absolute separation is really possible. . . ." Walz, supra, at 670. Amici agree with the District Court "that the Establishment Clause does not prohibit a de

minimis expenditure from the public fisc to incidentally aid religion." Williamsport, supra, 563 F.Supp at 715.

Of course, meetings of Petros would advance religion; but "[a]ny advancement of religion would come from the students themselves, and this the Establishment Clause does not bar, it being a limitation on government conduct rather than on individual activity." Williamsport, supra, 563 F.Supp at 711. Sanctioning the inclusion of Petros in Williamsport Area High School's existing limited open forum would not violate the "primary effect" test.

3. **The entanglement test:** Amici assert that, besides not violating the "primary effect" test by communicating government endorsement of religion, the presence of a non-participating agent of the state -- i.e. monitor or record keeper -- at a meeting of Petros would not

constitute excessive entanglement of government with religion. "The test is inescapably one of degree." Walz, supra, at 674. The Williamsport school day has begun when the activities period takes place; therefore, students must be accounted for somewhere in the building and order must be maintained. A teacher or other employee of the school system who is present in the room assigned Petros during the activities period would be carrying out routine functions. The degree to which such a person would be entangled, if any, with the religious expression taking place within the meeting would be negligible.

The court below (741 F.2d at 555) describes the entanglement test as

> "essentially a procedural problem." (Roemer v. Board of Public Works, 426 U.S. 736, 755 (1976) (Blackmun, J., for the plurality). Government must avoid excessive entanglement with religion where "continuing state surveillance will inevitably be

> required to ensure that [the] restrictions [of] . . . the First Amendment [are] respected." Lemon, 403 U.S. at 619.

The routine tasks of taking roll and ensuring order assigned a Petros monitor fall far short of maintaining such surveillance. Nor is such surveillance required considering the student-initiated, voluntary nature of the activity.

The preceding discussion, amici contend, amply supports our initial assertion that allowing Petros to meet does not constitute an establishment of religion. However, assuming, arguendo, that some small degree of establishment were involved, it is clear that student free exercise and free speech rights are also involved. Laurence H. Tribe, Professor of Law at Harvard Law School, maintains in American Constitutional Law, p. 819, "Whenever a free exercise claim conflicts

with an absolute non-establishment theory, the support of the former would be more faithful to the consensus present at the time of the Constitutional Convention and of the First Congress."

II.

Failure to grant Petros permission to meet as a part of a limited open forum violates free exercise of religion rights.

Students have no unqualified right to corporate free exercise of religion in the public schools. However, in the instant case, the state, by denying Petros permission to meet during the activities period, burdened the free exercise of religion of Petros' members. In Yoder, supra, the Supreme Court set out its tests for determining when state action unconstitutionally infringes on the free exercise of religion. Yoder requires that the state demonstrate a compelling interest which cannot be

served by less restrictive means if the burdening is to be constitutional. The Court made the test more rigorous in Elrod v. Burns, 427 U.S. 347, 362 (1976): "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest."

Respondents argued below that they were required by the establishment clause of the First Amendment to deny Petros access equal to that enjoyed by other student groups in the use of school facilities during the activities period. The District Court below, as well as the Supreme Court in Widmar, denied that interpretation of the establishment clause. Neither case has facts to support an establishment clause requirement to exclude religious groups from a limited open forum which they fail to dominate.

The court in Brandon v. Board of Education of Guilderland School District, 635 F.2d 971 (1980), cert. denied, 454 U.S. 1123 (1981), (decided before Widmar, cert. denied after Widmar without a reason given for denial) used the "compelling state interest" test in two different ways. At one point the court agreed with the school board that the establishment clause constituted a compelling state interest for refusal of students' request for the use of school facilities before the school day began. Brandon, supra, at 978. (Amici's opinion is that by dropping the reference to Brandon in fn. 13 in the Widmar slip opinion the Supreme Court indicated that it had overlooked the presence of other student groups meeting outside of regular school hours.) We disagree with the court's finding that the establishment clause can be a "compelling state interest" for

burdening the free exercise of religion.

At another point the court in Brandon, supra, at 976, correctly stated the "compelling state interest" test:

> A limitation on religious exercise is justified only if the state can demonstrate that its compelling interest in public health, welfare, morality, or other secular values justifies the restriction, and that less restrictive means to achieve the state's secular ends are not available.

Amici accept the court's statement above as the proper test. We assert that the establishment clause cannot properly be argued as a compelling state interest in the state's burdening of the free exercise of religion. The only compelling interest for which the state may burden free exercise is its interest "in public health, welfare, morality, or other secular values. . . ."

The establishment clause limits government power. A limit on state action cannot reasonably constitute a

compelling state interest for burdening First Amendment rights of citizens. The state has an obligation under the Constitution not to take actions "respecting an establishment of religion." The constitutionality of the state's actions under the establishment clause are subject to the Lemon tests. It is bootstrapping to claim the establishment clause as a compelling state interest under the free exercise clause. Not only the establishment clause but also the free exercise clause is a limit on government power. Both are designed to secure religious liberty. To argue that one can be considered a "compelling state interest" to swallow the other destroys the very religious liberty that the two clauses were intended to preserve.

In the case at bar the state has clearly burdened the free exercise rights of a group of students (Petros) without

demonstrating a compelling state interest "in public health, welfare, morality, or other secular values." Even assuming, arguendo, that the establishment clause may be a compelling state interest, as noted in Argument I the establishment clause would not be offended by granting Petros access to the use of school facilities on an equal basis with student groups which have secular purposes.

In Walz, supra, at 668, Mr. Justice Burger said, "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Considering these words to be very descriptive of the Court's role in the case at bar, amici urge that the neutral course here lies in honoring the distinction between

state action and student-initiated action.

III

The free speech of the student members of Petros may not be restricted solely because that speech has a religious content.

Freedom of speech is not absolute. One cannot falsely cry "Fire!" in a crowded theater. See, Schenck, supra. Public profanity and fighting words may be banned. There are other legitimate limitations on free speech, but as the Supreme Court said in Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949), ". . . freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

Widmar, supra, was decided on the

basis that the state had unconstitutionally limited the free speech and association rights of student members of Cornerstone. The District Court below applied Widmar to the instant case. Amici have argued above that it was correct to do so. Free speech rights of students in our public schools are not to be infringed for unconstitutional reasons. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker, supra, at 506. The Court further said, at 513:

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to

> permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

"Reasonable regulation of speech-connected activities" does not comprehend the limiting of speech simply because that speech has religious content.

Religious speech in public schools may be limited. See, Engel, supra, 370 U.S., Schempp, supra, 374 U.S. These "school prayer cases" involved state-required, state-written, state-sponsored, and state-supervised religious exercises. State action respecting an establishment of religion was involved. The only state action involved in the instant case was the creation of an activities period and the refusal to grant permission for Petros to meet. Petros was a student-initiated, exclusively student-run group.

The religious speech to be incorporated in the group's meetings was entirely private action, not state action. The state prohibited speech solely because of its religious content. This the state may not do. "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." Tinker, supra, at 511. Respondents persist in their attempt to bootstrap the establishment clause limits into a compelling state interest, solely to limit the free speech of the Petros students because of the religious content of that speech.

"Our courts . . . have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." Epperson, supra, at 104. Freedom of

speech, which the Court called a fundamental value, has been severely limited by state action in the instant case solely on the basis of the religious content of the speech of student members of Petros. The First Amendment mandates that the state, not private persons, be the object of severe limitations as it seeks to deal with this fundamental value.

IV

The actions of Respondents in refusing Petros access to school facilities during the activities period on an equal basis with other student groups deny to Petros the equal protection of the laws.

Religious organizations may not be denied the equal protection of the laws simply because they are religious. The Fourteenth Amendment's equal protection of the laws clause and the equal protection component of the due process of law clause of the Fifth Amendment clearly

require the state to treat persons equally unless there are constitutional reasons to do otherwise. There are instances where fact patterns require the balancing of rights and thus require that the state treat religious and secular groups unequally. However, the facts in the case at bar do not require that the Petros group, a religious group, and the other secular student groups be treated unequally.

In an entirely different context the Supreme Court in Yick Wo v. Hopkins, 118 U.S. 356, 373, 374 (1886), said that if a state action which is facially fair and impartial is administered "so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the Constitution." The obvious discriminations between Petros and the

secular-purpose student groups at Williamsport Area High School are patently a denial of equal justice. The discriminations were purely on the basis of the religious purpose on which Petros was organized. As such the discriminations were "unjust and illegal" and denied to student members of Petros the equal protection of the laws.

CONCLUSIONS

The proper role of religion in the public schools is an emotional, divisive issue in American public life. Both persons who want religious exercises in public schools and persons who want no mention of religion and no religious speech in public schools have interpreted the Supreme Court's establishment clause cases as banning God and prayer from the schools. Amici assert that this

interpretation is incorrect.

Amici firmly oppose establishment of religion in schools by government's mandating, sponsoring, initiating, promoting or organizing religious activity. Amici are equally concerned that religious speech not be discriminated against because of its religious content and that public school students not experience an official state hostility toward religion.

Judge Adams, in dissenting from the opinion below, clearly describes amici's concern and a primary perspective from which we approach the case at bar:

> To the extent the majority is concerned about impressionability of high school students, they are required to consider that the exclusion of Petros will introduce content-based restrictions in an otherwise open forum that may in fact be understood as a manifestation of official hostility towards religion. It is well settled that the First Amendment proscribes governmental hostility towards religion, as well as governmental promotion of religion. . . . When this Court sustains Williamsport's decision not to permit

> meetings by Petros, it sanctions a policy singling out a religious group as the only student activity ever to be excluded in the high school's history. In light of its view of the maturity of high school students, the majority . . . is obligated to explain why such a selective exclusion does not raise First Amendment problems of perceived governmental disapproval of religion. 741 F.2d at 565. (citations omitted).

> One of the great triumphs of America's constitutional experiment has been the avoidance of religious factionalism in the political sphere. Our country's continued progress in this endeavor ultimately depends on the individual citizen's tolerance and respect for religious diversity. When the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, . . . the Constitution and the Nation are the better for it. 741 F.2d at 569.

"Freedom of press, freedom of speech, freedom of religion are in a preferred position." Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 115 (1943). Any state intrusion into religious liberty requires strict scrutiny. Limits on religious liberty are permitted only when the heaviest

burden of proof has been borne by the state. Respondents have not demonstrated either an establishment case or a compelling state interest to justify limiting either the free exercise of religion or the freedom of speech of Petros' members. Respondents have not justified denying equal protection of the laws to Petros' members. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960).

For these reasons amici respectfully request that this Court uphold the right of the Petros students to meet in Williamsport Area High School. We do so with the assurance that future imitations of Williamsport's activities period will not be allowed to violate the constitutionally required separation of church and state "while this court sits." See,

the Supreme Court's quoting with approval from Justice Holmes' dissent in Panhandle Oil Company v. Mississippi, 277 U.S. 218, 223 (1928) in Marsh v. Chambers, ____ U.S. ____, 103 S.Ct. 3330, 3337 (1983).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald R. Brewer, do certify that two (2) copies of Brief of the Baptist Joint Committee on Public Affairs, the National Association of Evangelicals, The National Council of the Churches of Christ in the U.S.A., and the Presbyterian Church (U.S.A.) as Amici Curiae in Support of Petitioners were today, May 6, 1985, mailed by United States Mail, first class postage paid, to the following:

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No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF OF KIWANIS INTERNATIONAL AND KEY CLUB INTERNATIONAL AS *AMICI CURIAE* PARTIALLY IN SUPPORT OF RESPONDENTS AND PARTIALLY IN SUPPORT OF NEITHER PARTY

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INTEREST OF KIWANIS INTERNATIONAL AND KEY CLUB INTERNATIONAL[1]

As framed and decided in the courts below, this case presents two distinct questions: (1) Whether the petitioner high school students have a right under the Free Speech Clause of the first amendment to engage in their religious activity on the ground that the high school's student activity period constitutes

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[1] Kiwanis International and Key Club International have received the written permission of the parties to file this brief as *amici curiae*, and these consents have been sent to the office of the Clerk for filing.

a "public forum;" and, (2) if the claimed free speech right is found, whether the Establishment Clause requires that petitioners nonetheless be denied access to the high school's activity period. *Amici* Kiwanis International and Key Club International have no interest in the Establishment Clause issue, but they have two interests in the predicate "public forum" issue. First, the Court of Appeals' opinion asserts that high school Key Clubs are "not curriculum-related."[2] Since the recently-enacted Equal Access Act includes a similarly worded standard, if this Court were to repeat that assertion *amici* could find their groups excluded from many high schools. Second, the Court of Appeals' analysis of the constitutional free speech issue in this case could force school officials to exclude Key Clubs from high schools in order to avoid creating a wide-open public forum.

Kiwanis is an organization devoted to the principle of community service and the development of intelligent and active citizenship. Kiwanis International represents local Kiwanis Clubs in more than 8,000 communities throughout the United States and many other countries. Key Club International, an association under the ultimate control of Kiwanis International, represents local Key Clubs, which are organizations of and for high school students.

Key Clubs are sponsored by local Kiwanis Clubs and may be organized at a high school only with the approval and expressed desire of the school officials to have a club at the school. Through the guided initiative and active participation of high school students, Key Club works to promote community service and to develop leadership and active citizenship. Local

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[2] Although it did not advert either to the courses offered at the Williamsport High School or to the specific activities of that Key Club, the Court of Appeals stated that "Key Club, a service and community organization, has little direct relevance to normal course offerings." *Bender v. Williamsport Area School District*, 741 F.2d 538, 549 n.18 (3d Cir. 1984).

Key Clubs develop and conduct educational programs in leadership, civics and citizenship, and also engage directly in community service activities. Particular service activities may be in support of the operation of the high school[3] or of the broader community.[4] Key Club is the largest student organization of its kind and has a highly developed district, national and international structure, over 3,600 active local clubs and more than 107,000 student members.

The interests of *amici* Kiwanis International and Key Club International are directly affected by the resolution of the predicate free speech issue in this case. The Court of Appeals relied in particular upon the presence of the Key Club at the Williamsport High School, together with certain others such as the Chess Club, in determining that the respondent school officials had created a "public forum" activity period, thereby mandating a first amendment right of access for student activities other than those approved by respondents. *See Bender v. Williamsport Area School District*, 741 F.2d 538, 543-44 & n.8, 548-49 & n.18 (3d Cir. 1984).

So far as the "public forum" issue is concerned, the religious nature of petitioners' speech is entirely fortuitous. The

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[3] Typical school-related services include school assemblies dealing with drug and alcohol abuse, suicide, stress, divorce and child abuse, Career Day and vocational guidance, Campus Clean-up, anti-vandalism and anti-cheating campaigns, and providing college scholarships to outstanding graduating seniors. Key Clubs are encouraged to tailor programs to address the individual needs of their schools, and school-related services can take a nearly infinite variety of forms. In one Indiana community, for example, the Key Club raised the funds for and is responsible for servicing and maintaining the large sign in front of the high school informing the public of current school activities.

[4] Typical community-related activities include voter registration and transportation programs, alternative latch-key programs for children of working parents, nursing home visitation and other services to enhance the lives of the elderly and handicapped, and working with established charitable organizations.

principles governing the free speech claim would be identical whether the claim is asserted by these petitioners or by students wishing to engage in speech and related activity of other sorts, including partisan political, extremist, and counter-cultural activities. Under the Court of Appeals decision, so long as a court can discern a connection between the student activity for which access is sought and some "promot[ion of] the intellectual, physical or social development of the students," 741 F.2d at 549 — which under ordinary first amendment doctrine would necessarily include speech and related activity of any sort that is not affirmatively illegal — local school authorities must permit it if they permit a Key Club or other activity the court believes is not "directly related to a particular curricular offering . . . ." *Id.* Thus, local school officials not wishing to lose control over their student activity periods may decide to exclude Key Club and comparable activities.

The interests of these *amici* are potentially affected in another respect as well. Under the Equal Access Act, 20 U.S.C.A. §§ 4071-4074 (Cum. Supp. 1985), which was enacted after the record in this case was framed and the issues decided, a school's activity period is deemed a "limited open forum" if a "noncurriculum related student group" is permitted to meet during "noninstructional time." *Id.*, § 4071(b). The legislative history of the Act indicates, however, that school authorities have discretion to determine in view of local conditions whether particular student activities are "noncurriculum related." Needless repetition by this Court of the Court of Appeals' speculation's on "curriculum-relatedness" as a legal standard or its generic conclusion that Key Club is "not curriculum-related" would adversely affect the interests of *amici* under the Equal Access Act, hindering if not foreclosing the willingness of school administrators to exercise their discretion and determine this issue according to the particular school's curriculum, the activities of the particular Key Club, and other local factors.

SUMMARY OF ARGUMENT

The Court of Appeals erred in finding a free speech right of access to a high school's student activity period. As this Court's precedents establish, the government may permissibly distinguish among subject matter categories of speech in a nonpublic forum, and a public forum is created only if made generally available for public use. Neither the particular student activities approved at this high school nor a transgression of the Court of Appeals' "curriculum-related" standard demonstrates the open and indiscriminate use required to create a public forum. Local school authorities may allow selective access to types of activities based upon their relationship to the general operation of the school without converting an activity period into a public forum for students.

The most serious error in the Court of Appeals' "public forum" analysis is its insensitivity to the character and needs of secondary school education. As this Court has recognized, the nature of the educational process requires that local school officials constantly make judgments about the relative educational worth of subjects and materials, and their consistency with community values. This is as true for the student activity period as for the rest of the school day. Even when students are given the initiative in choosing activities, school officials retain authority to decide whether particular activities are of sufficient educational value or are otherwise beneficial to the students and the school.

The question is not, as the Court of Appeals apparently thought, whether a court "considers" an unapproved activity to be beneficial to the students' development or comparable to another activity which has been approved. The question is whether local education officials believe that is so. The activities approved in this case do not show that the local officials had forefeited their responsibility to make these decisions on a case-by-case basis, and the Court of Appeals' "curriculum-related" criterion for a "public forum" undermines the discretion of local officials for no valid first amendment

reason. Under that criterion, school officials must either exclude student activities they believe to be educationally beneficial, or lose to a student-controlled "public forum" their authority to make such judgments altogether.

Local officials must also have authority to exclude contentious and emotion-provoking student activities that would undermine the educational mission of the school. Although perhaps constrained by a prohibition on viewpoint discrimination, local educators may properly exclude categories of controversial activities that would, in their professional judgment, distract student attention and be disruptive to learning during other parts of the school day. No valid reason appears why this authority should be lost merely because school officials allow particular activities that go beyond a court's view of a "curriculum-related" line.

Given the subsequent enactment of the Equal Access Act, this Court should not repeat the Courts of Appeals' speculations as to the nature and type of student activities that meet a "curriculum-related" standard. The statute is not before the Court, the statutory standard may well be different than the constitutional one used by the Court of Appeals, and this case is not factually framed for adjudication of such issues.

ARGUMENT

I. Local School Authorities Have Broad Discretion To Allow Different Types Of Student Activities Without Creating A Public Forum Under The First Amendment.

The Court of Appeals offered three related reasons for holding that the student activity period at the Williamsport Area High School constituted a limited public forum. First, although there was no written or formal policy governing approval of student activities, the high school principal stated in a summary judgment affidavit that an activity would be allowed if it " 'contribute[s] to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper.' " 741 F.2d at 544, 548. The court treated the principal's statement as if it were a statute and used it against the respondents, saying that this standard is "so broad that virtually any program which can be said to benefit the development of the students is permissible . . . ." *Id.* at 549-50. Second, in the memory of the principal, no student club or activity had been denied school sponsorship until the petitioners in this case. *Id.* at 543, 548. Third, the court viewed several of the approved activities as not "directly related to a particular curricular offering", *id.* at 549, and this lack of "curriculum-related[ness]" confirmed the breadth of the "forum" the school had created:

> For instance, Key Club, a service and community organization, has little direct relevance to normal course offerings. Likewise, the Chess Club, the Aviation Club, and the Office Aides, among others, have at best only a tangential relation to a high school course of study.
>
> While it might be said that each of these activities enhances the curricular goals of the school by promoting civic awareness (the Key Club), logical thought (the Chess Club), practical applications of scientific principles (Aviation Club) or a general sense of responsibility (Office Aides), the same extended chain of reasoning could be used to justify religion as a promoting of civic, social, and

> intellectual values. Thus, the roster of activities approved in the past reveals no more restrictive limitation on the activity period than that which has been articulated, *i.e.*, that clubs promote the "intellectual, physical, or social development of the students."

741 F.2d at 549 n.18.

The Court of Appeals apparently could see no middle ground between allowing only clubs "directly related to a particular curricular offering" and allowing any activity which, in the *court's* view, "can be said to benefit the development of the students." In essence, because the high school had allowed activities such as Key Club and Chess Club, it had created a limited public forum which must be made available to any student-desired speech and related activity that might be viewed as "promot[ing] the 'intellectual, physical or social development of the students.' "

That reasoning and result obviously cannot be limited to the religious speech and activity involved in this case, and the draconian consequences that necessarily follow for the authority of local school officials should not be overlooked. By ignoring the middle ground, the Court of Appeals' reasoning forces local authorities *either* to limit student activities to those a court thinks are directly related to existing courses, *or* to permit any and all manner of speech and related activity that students desire to engage in, save only that it be legal. Quite apart from any Establishment Clause issues in this case, the Court of Appeals' analysis would require a school with a Key Club or Chess Club to allow also a student-initiated Nazi party, Communist cell, Ku Klux Klan sect, or drug use, sexual liberation or any other countercultural advocacy group that confined its in-school activities to legal speech and conduct. Under ordinary first amendment principles, a federal court could not say that any such speech and activity would not "benefit the development" of students while other forms of speech or advocacy would.

The public forum doctrine does not require local school officials to make this stark choice between either confining student activity to "curriculum-related" activities or permitting virtually any student speech activity. Moreover, while *federal courts* may not be able to distinguish between categories of lawful speech, *local education officials* may indeed distinguish between types of student activities by making — as their everyday duties require — reasonable educational judgments as to what will "benefit the development" of high school students. That lawful discretion of local officials does not evaporate merely because they determine that activities such as Key Club or Chess Club will be beneficial.

A. This Court's Public Forum Doctrine Does Not Require The "Curriculum-Related" Standard Imposed By The Court Of Appeals.

As a general rule, "[t]he state, no less than a private owner of property, has power to preserve the property under its control" and to regulate its use. *United States Postal Service v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 129-30 (1981). Under the "public forum" doctrine, however, there are two exceptions. The first consists of places such as public sidewalks and parks "which by long tradition or government fiat have been devoted to [public] assembly and debate . . . ." *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). This exception is not involved here, however, because unlike traditional public forums, the Court has never "suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes." *Grayned v. City of Rockford,* 408 U.S. 104, 117-18 (1972). The second exception is where the government has in fact created a public forum by making it "*generally* open to the public even if it was not required to [do so] in the first place."

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 45 (emphasis added).[5]

In the case of a "public forum," the government ordinarily may not regulate or prohibit speech on the basis of its content. Otherwise, however, the government may reasonably distinguish on the basis of categories of subject matter, and it is forbidden only from acting to "suppress expression merely because public officials oppose the speaker's view." *Perry Education Ass'n*, 460 U.S. at 46, 49. *See, e.g., Greer v. Spock*, 424 U.S. 828 (1976) (absent a public forum, government may discriminate between partisan political and other speech); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (absent a public forum, government may discriminate between commercial and other speech).

Perry Education Ass'n makes plain the government's power to distinguish between subject matter categories of speech in a nonpublic forum, and also that a public forum is not created unless the government makes it "*generally* open" and available for "*indiscriminate* [public] use." 460 U.S. at 45, 47 (emphasis added). *Perry* rejected the argument that a public school system's internal mail system had become a public forum merely because certain "outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations" had used it with school officials' permission. "*This type of selective access does not transform government property into a public forum.*" *Id.* at 47 (emphasis added). Moreover, any right of access created by the selective access "would in any event extend only to other [groups] . . . of *similar character.*" *Id.* at 48 (emphasis added). Even mechanical application of these principles shows that the Court of Appeals' "curriculum-related" line for distinguishing between a "public forum" and a "nonpublic forum" student activity period is meritless, and that no public forum was created on the basis of the evidence that

[5] Of course, the public forum created may be a limited one, *see Perry Education Ass'n*, 460 U.S. at 46 n.7, as the one found by the Court of Appeals here would be limited to the high school's students.

the court recites in this case.[6]

First, the list of student groups and clubs that had been approved for the activity period in this case simply does not show that the activity period was "*generally open*" and available for "*indiscriminate use*" by the students.[7] Just as the selective access (with prior permission) by the YMCA or other "civic groups" to the mail system in *Perry Education Ass'n* was insufficient to show creation of a public forum constitutionally mandating access for the plaintiff labor organization, so too the presence of the "Aviation Club" or the "Office Aides" does not establish the creation of a public forum constitutionally mandating access for, say, partisan political student groups, let alone more extreme sorts of student activities that the "public forum" conclusion would require.

Second, the obviously imprecise relationship between the groups selectively allowed access in *Perry Education Ass'n*

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[6] There is no hint in this case of the problem that divided the Court in *Perry Education Ass'n* — whether the challenged denial of access represented discrimination based upon hostility to the speaker's point of view.

[7] As stated by the Court of Appeals, in this case:

> [S]tudent clubs which are currently active include: Student Government; Key Club (a student service organization performing community work); Class Organizations (officers for each class); Business English Club; Future Homemakers of America (devoted to learning good home practices and providing service to various charity organizations); Vocational Technical Club; Spanish Club; Speech and Drama Club; Ecology Club; The Cherry & White (student literary art magazine); Billtown Banner (student newspaper); La Memoire (student yearbook); Band; Choir; Office Aides (assisting in filing, answering telephones, and running errands).
>
> Other clubs which have been approved in the past and might be renewed if interest warranted are the Archery; Art; Audubon; Aviation; Bowling; Chemistry; Chess; Field, Forest and Stream; Future Nurses; Future Teachers; German; Poetry; Photography; and Ski Clubs. App. at 367. (Affidavit of Principal W. Newton).

741 F.2d at 543-44 n.8.

shows that no fixed or articulated boundary, such as the Court of Appeals' "curriculum-related" standard, is required to avoid "public forum" status. As in *Perry*, local school officials may make reasonable judgments on a case-by-case basis about the relationship between particular groups and the school's *general* mission. They could, for example, reasonably decide that Key Club as a student activity accords with the school's general objectives in ways that some other group does not. This could be based on a relationship between the school's general obligation to instruct in citizenship and Key Club's teaching of civic responsibilities, or a relationship between the school's general need for resources and a particular Key Club's fund raising or provision of student volunteers to support a given school activity. *See* n. 3, *supra*.

On the authority of *Perry Education Ass'n*, the Eighth Circuit has properly rejected a "public forum" claim in a context that necessarily refutes the Third Circuit's "curriculum-related" standard in this case. *Jarman v. Williams*, 753 F.2d 76 (8th Cir. 1985). There, school authorities had permitted relatively widespread access to the school's gym during non-school times. However, the facilities had

> been used only by certain groups that seem[ed to the court] . . . to be school-related *in the broad sense:* karate instruction, gymnastics, piano lessons, Booster Clubs, the Boy Scouts and the Girl Scouts. Requests by a church to use school facilities for a revival, and by someone who wanted to use the school facilities to conduct a flea market were turned down.

753 F.2d at 79 (emphasis added). On the basis of the decision on similar facts in *Perry*, the Eighth Circuit held that the school gym had not been converted into a public forum "obligat[ing] the school board to allow [it] . . . to be used for any other purpose protected by the First Amendment." *Id.*[8]

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[8] The recent enactment of the Equal Access Act has not mooted

(footnote continued on following page)

B. Local School Officials May Distinguish Among Student Activities Based Upon Judgments As To Their Relative Educational Value Or Relationship To The General Objectives Of The School.

Mechanical application of doctrine aside, by far the more serious error in the Court of Appeals' "public forum" analysis is its insensitivity to the character and needs of secondary school education. In this context, the real "public forum" question is whether the school officials have relinquished their authority to evaluate and distinguish among different student activities in terms of relative educational benefit or other relevant criteria. It is, of course, highly improbable that school authorities would actually do this, at least in the case of activity periods during compulsory attendance hours. Why, if all educational control has been abandoned, should school attendance at that time be

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(footnote continued from previous page)

the constitutional issue presented in this case. First, although that legislation uses a "noncurriculum related" standard to attach a right of access, the statutory standard appears to be more deferential to the judgment of local school officials on this issue than the constitutional one applied by the Court of Appeals in this case. *See* Part II, *infra*. Second, the coverage of the Equal Access Act is limited to "noncurriculum related student groups" meeting during "noninstructional time," which is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends," 20 U.S.C.A. §§ 4071(b), 4072(4), whereas the constitutional "public forum" claim is not so limited.

Moreover, although the issue is not presented to the Court in this case, the "noninstructional time" limitation on the Act's coverage may be far more significant than the United States has suggested to the Court. *See* Brief For The United States As *Amicus Curiae* at 3 n.2. In the highly significant Senate debate on the final version of the Act, one of its co-sponsors flatly stated that the statute had been limited so it would not apply to student activities during times of compulsory school attendance, including homeroom periods (which are the facts of the activity period in the instant case). *See* 130 Cong. Rec. S. 8353-54 (daily ed. June 27, 1984) (colloquy between Senators Packwood and Metzenbaum).

compulsory at all? In any event, the first amendment does not force local officials to choose between either excluding all activities that are not directly "curriculum-related" or else abandoning altogether their control over the subject matter of student activities.

As this Court "has long recognized,"

> local school boards have broad discretion in the management of school affairs. . . . [The Court has] reaffirmed that, by and large, "public education in our Nation is committed to the control of state and local authorities" . . ., that federal courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems," . . . [and has] "repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."

Board of Education v. Pico, 457 U.S. 853, 863-64 (1982) (plurality opinion) (citations omitted). *Accord, id.* at 891 (Burger, C. J., dissenting), *id.* at 894 (Powell, J., dissenting). Moreover, given the nature of the task of education, which includes socialization of children no less than the imparting of information, and "inculcating fundamental values necessary to the maintenance of a democratic political system," the Court has agreed

> that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values" and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political."

Pico, 457 U.S. at 864 (plurality opinion) (citations omitted). *Accord, e.g., id.* at 876 (Blackmun, J., concurring in part and in judgment) ("[b]ecause of the essential socializing function of schools, local education officials may attempt 'to promote civic virtues' . . . and to 'awake[n] the child to cultural values' ") (citations omitted); *id.* at 889 (Burger, C. J. dissenting); *id.* at

896 (Powell, J., dissenting); *id.* at 909 (Rehnquist, J., dissenting); *Plyler v. Doe,* 457 U.S. 202, 221-23 (1982).

These two salient characteristics of public education — local community control and the value-laden nature of the process — require school officials constantly to make decisions distinguishing among values, subjects and materials in terms of both perceived educational benefit and relationship to the particular school's general philosophy and specific operations. The need for these judgments is no less in the area of student activities than for any other part of the students' school day. And whether school officials allow for student choice over a wide range of activities or rigidly prescribe a narrow approved list, those officials' authority and responsibility for ultimate approval of all activities still require the same sort of judgments about relative educational worth and the local school's general mission.

> Of necessity, . . . secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. . . . This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.

Pico, 457 U.S. at 914 (Rehnquist, J., dissenting).

Moreover, the fact that students are given the initiative and allowed a broad range of choice in activities provides no reason — and certainly no *constitutional* reason — for saying that school officials must then forego altogether their ultimate responsibility to decide which matters are of sufficient educational value to deserve a student's time at school. Even where officials articulate a broad standard of permissibility, such as the high school principal's statement in this case, the breadth does not show they have abandoned their responsibility for making difficult decisions on the boundaries. If the articulated policy is broad or imprecise, that may indicate only that hard questions have not arisen before.

The Court of Appeals' "public forum" analysis, however, effectively prohibits local school officials from making these sensitive and discretionary judgments. The court first quotes the respondent school principal's description of his practice as approving " 'any student activity or club which *is considered* to contribute to the intellectual, physical or social development of the students . . . .' " 741 F.2d at 548 (emphasis deleted in part). It then decides that an open forum has been created because *the court* cannot distinguish between activities that have been approved and others that might "be said" to achieve the same results. *Id.* at 549 & n.18. In terms of the principal's description of his practice quoted by the court, however, the issue is not whether *the court* " consider[s]" an activity to "contribute" to educational development but whether the *responsible local school official* considers it to do so.

At least in the absence of viewpoint discrimination, it is up to school officials to judge which proposed student activities will "contribute to [students'] intellectual, physical or social development," particularly as those criteria are implicitly modified by the officials' understanding of the individual school, school system and community. It is simply immaterial whether a court sees "little direct relevance" between a Key Club and "normal course offerings" or "only tangential relation" between the Office Aides and "a high school course of study," or a greater or lesser degree of such relationship between those activities on the one hand and petitioners' proposed religious activities on the other.

Given the responsibility of local school officials to make choices both among alternative educational values and among competing ways to serve the values chosen, the Court of Appeals' "curriculum-related" public forum standard is particularly untenable. That standard destroys in the area of student activities — and for no discernible reason — the ability of local school authorities to perform their function. Either they dare not allow any activity that may lie beyond a court's perception

of a "curriculum-related" line, no matter how beneficial school officials judge the particular activity to be, or they lose control over student activities altogether and must acquiesce in whatever students may think is the "best" use of their school activity time. The courts below identified no reason why the first amendment would require that Hobson's choice.

These *amici* further suggest that far more should be required to create a public forum in a high school activity period than is presented here. The list of familiar high school student activities that had been approved in this case, *see* n. 7, *supra,* does not permit a fair inference that this school principal had abandoned in the area of student activities his responsibility to make educational choices for the students. The fact that activities such as Key Club, Chess Club and Office Aides had been approved does not show — as would be required for a public forum — that a student Nazi Party, a "repeal-the-drug-laws" group, or even the Young Republicans would have been approved. For all that appears in the lower court opinions, and doubtless the fact of the matter, such issues simply had never previously arisen.[9]

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[9] The principal's standard (as articulated in his affidavit on a summary judgment motion) is broad, but that breadth may simply reflect the fact that few, if any, difficult judgments had been required. Hard choices could refine that standard further. Most important, there is no suggestion in this case that respondents were employing a broad standard to shield discrimination based on their hostility to particular ideas or a particular viewpoint.

Similarly, the fact that no previously suggested activity had been disapproved does not prove that a public forum had been established. Indeed, in any situation where the government has allowed limited access but has not created a public forum, some group will necessarily be the first to be denied access and it obviously cannot claim special rights based on that happenstance. *See, e.g., Perry Education Ass'n,* 460 U.S. 37, where so far as appears from the Court's opinion the plaintiff labor organization was the first group to be denied access to the school's internal mail system.

C. Local School Officials May Also Distinguish Among Categories Of Student Activities Based Upon Judgments As To Their Compatibility With The Educational Process And May Preclude Contentious And Emotion-Provoking Activities On This Ground.

In addition to exercising judgments with respect to the educational value of proposed activities, school officials must also have discretion to exclude categories of secondary school student activities where they believe the controversial nature of the subject matter and consequent emotional distractions and psychological stresses would be at odds with the educational mission of the school. The fact is that "in the public school context, perhaps no one, but certainly not the judiciary, can readily ascertain the mental or emotional state that is necessary, appropriate, or desirable for learning to take place." Diamond, *The First Amendment and The Public Schools: The Case Against Judicial Intervention*, 59 Tex. L. Rev. 477, 486 (1981). However difficult that judgment is to make, it is one that must be left to local educators and this is as true for a student activity period as for the rest of the school day.

Educators in a particular school or community may conclude that high school students are best educated by exposure to and struggle with the most controversial and emotionally-charged topics of the day. In another community or school with a different educational philosophy, educators may make an equally informed and reasonable educational judgment that pursuit of a particular subject matter is likely to provoke emotions and reactions that would, by distracting student attention, undermine the learning environment and the educational purposes of the institution. Such a judgment could, for example, be based on predictions of post-activity period student interactions and their lingering effects during the day, such as quarrels about eternal damnation between students who do and do not attend a religious activity. Alternatively, such a judgment could be based upon evaluation of the likely

emotional states of some students during the minutes and hours following their attendance at an ideological or contentious political activity.

> Normal first amendment standards are . . . inappropriate because the proper functioning of the school is not, except at its gross extremes, an objectively ascertainable phenomenon. The judiciary cannot know the extent to which any kind of distraction during the course of the day interferes with learning. A court can observe that fistfights did not break out and that no one complained about being prevented from doing his work. But the court cannot begin to know even the amount of distraction that actually occurred, either in the students' minds or beyond their awareness. In the street corner context, the court can say that distraction does not matter and can measure the functioning of the institution by whether people can use the streets. The lack of knowledge about what really enables people to learn and about the complex interrelationships of the variables involved prevent courts from judging that no interference has taken place in the school.

Diamond, *supra,* 59 Tex. L. Rev. at 497-98.

Such pedagogical considerations are not unknown to this Court's jurisprudence. In *Waugh v. Board of Trustees,* 237 U.S. 589 (1915), this Court sustained against constitutional challenge a State's decision to forbid students at its public universities to be members of private fraternities, stating that the decision

> may have been induced by the opinion that membership in the prohibited societies divided the attention of the students, and distracted from that singleness of purpose which the state desired to exist in its public educational institutions.

Id. at 597. Years later, a lower federal court upheld a rule forbidding such activities by high school students, again on the basis of legitimate educational judgments regarding "divided . . . attention" and student "distract[ions]." *Hughes v. Caddo Parish School Board,* 57 F. Supp. 508, 512-13 (W.D. La.

1944). This Court summarily affirmed. 323 U.S. 685 (1945). More recently, the Sixth Circuit invoked the same sorts of educational considerations in upholding against constitutional challenge a rule forbidding high school students from wearing buttons and similar items which would identify them "as supporters of a cause or bearing messages unrelated to their education." *Guzick v. Drebus,* 431 F.2d 594, 596 (6th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971).[10]

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[10] With little alteration, the trial court findings quoted by Sixth Circuit in support of that conclusion could be equally applicable to a school's decision to exclude a given category of student activities from an activity period:

> "The rule was created in response to a problem which Shaw has had over a period of many years. At the time high school fraternities were in vogue, the various fraternities at Shaw were a divisive and disruptive influence on the school. They carved out portions of the school cafeteria in which only members of a particular fraternity were permitted to sit. The fraternities were competitive and engaged in activities which disrupted the educational process at Shaw. There were fights between members of the individual fraternities and often strong feelings between the members.
>
> "The same problem was encountered with the informal clubs, which replaced high school fraternities and sororities. The problem again exists as a result of the racial mixture at Shaw. Buttons, pins, and other emblems have been used as identifying 'badges.' They have portrayed and defined the divisions among students in the school. They have fostered an undesirable form of competition, division and dislike. The presence of these emblems, badges and buttons are taken to represent, define and depict the actual division of the students in various groups.
>
> "The buttons also encourage division among the students, for they portray and identify the wearer as a member of a particular group or the advocate of a particular cause. This sets the wearer apart from other students wearing different buttons or without buttons. It magnifies the differences between students, encourages emphasis on these differences, and tends to polarize the students into separate, distinct, and unfriendly groups. In

(footnote continued on following page)

It may be conceded for present purposes that this authority to exclude controversial and emotion-provoking student activities for pedagogical reasons is constrained by a first amendment prohibition against viewpoint discrimination, or possibly even open to judicial scrutiny of claims of official hostility to particular ideas such as divided the Court in *Pico v. Board of Education*, 457 U.S. 853.[11] The essential point is that in the absence of illicit motives, the first amendment leaves local officials to make these judgments in ambiguous educational circumstances, especially given the "tremendous empirical uncertainty over what constitutes the best, or even adequate,

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(footnote continued from previous page)

> addition, there have been instances in which students have attempted to force other students to wear a particular manner of dress or to wear their particular insignia or expressive button. For these reasons Shaw High officials have enforced the anti-button rule and have prohibited the wearing of such indicia."

431 F.2d at 596.

[11] However, *Perry Education Ass'n*, 460 U.S. at 52 n.12, suggests that in the absence of such problems, school officials need not prove actual or past disruption of the educational process to justify a categorical exclusion of certain activities on that ground — a reasonable educational judgment is sufficient. True, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), invalidated a ban on student armbands symbolizing opposition to the Vietnam War where it was contended that the resulting student controversy would be disruptive of the educational process. The case is distinguishable, however, as presenting a rather blatant instance of viewpoint discrimination:

> [S]chool authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol — black armbands worn to exhibit opposition to this Nation's involvement in Vietnam — was singled out for prohibition.

393 U.S. at 510-11.

learning environment." Diamond, *supra*, 59 Tex. L. Rev. at 486 n.51 and authorities cited. In this respect as well, however, the needs of public education cannot be accommodated within the Court of Appeals' expansive "public forum" doctrine.

D. *Widmar v. Vincent* Does Not Assist Resolution Of The Public Forum Issue In The Context Of A High School's Student Activity Period.

Whatever the relevance of *Widmar v. Vincent*, 454 U.S. 263 (1981), to the Establishment Clause issue presented here, that case does not materially aid resolution of the predicate "public forum" question. In *Widmar*, the Court repeatedly stated that the university facilities there had been made "generally available" for student activities and were a "generally open forum," 454 U.S. at 264, 267, 268, 269, 274, 277, and no one disputed that a public forum had in fact been created. Rather, *only* religious speech had been singled out and denied access, and the only question was whether the Establishment Clause provided a constitutionally sufficient justification for the discrimination.

It should be apparent for all of the foregoing reasons that *Widmar* is thus unhelpful in addressing the "public forum" question in this case. *Perry Education Ass'n* establishes that the government's permitting only selective access will not create a public forum, and further that if rights of any sort are conferred by reason of the selective access, they would benefit only activities or groups "of similar character." 460 U.S. at 48. *Widmar* does not even address the range and degree of student access to facilities required to create a public forum in the *university* context. It therefore sheds no light whatever on the circumstances required to reach the constitutional conclusion that a *high school's* student activity period constitutes a "public forum." Nor does it provide any support for the Court of Appeals' "directly related to a particular curricular offering" criterion.

II. Given The Intervening Enactment Of The Equal Access Act And Its "Noncurriculum Related" Standard, This Court Should Not Follow The Court Of Appeals' Speculations On "Curriculum-Relatedness" In This Case Which Is Not Properly Framed For Resolution Of That Issue.

After announcing its "curriculum-related" standard for determining whether a high school student activity period is a public forum, the Court of Appeals proclaimed that Key Club, among others, "has little direct relevance to normal course offerings." 741 F.2d at 549 n.18. So far as appears in the court's opinion, however, this conclusion was not based upon evidence in the record as to the particular school's curriculum or the activities of the particular Key Club. The court also speculated that the activities under consideration could "be said . . . [to] enhance the curricular goals of the school" (as by "promoting civic awareness" in the case of Key Club), but then found that this "same extended chain of reasoning" could be used to justify most any activity as curriculum-related and would not distinguish religious activity from any other. *Id.*

As shown above, this "curriculum-related" criterion is not the standard compelled by the first amendment for deciding whether officials at a public high school have created a public forum. Whether Key Club or any other activity is "curriculum-related" is thus not a matter essential to the resolution of this case. However, a similarly-phrased standard is now part of the Equal Access Act, which is not involved here. Under the Act, a public secondary school is deemed to have a "limited open forum" (and thus may not discriminate "on the basis of the religious, political, philosophical, or other content of speech") if it allows "noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(a)-(b); *see* n. 8, *supra.*

Although the issue will doubtless become the subject of future litigation, the legislative history of the Act indicates that local school authorities have considerably more discretion in

making this "noncurriculum related" determination than is indicated by the Court of Appeals' constitutional speculation and its "extended chain of reasoning" remarks in this case. *See, e.g.,* 130 Cong. Rec. S. 8342 (daily ed. June 27, 1984) (colloquy between Senators Hatfield and Gorton); 130 Cong. Rec. H. 7732 (daily ed. July 25, 1984) (remarks of Representative Goodling). Under this broader view of their discretion to decide, within reasonable limits, which student activities are and are not "noncurriculum related," particular school authorities have deemed Key Club to be "curriculum related" under the Act. Such determinations will necessarily be made on a case-by-case basis and in view of local circumstances such as the relationship between Key Club's general objectives and a civics course, or the specific club's activities and a course in leadership training.

These issues are not before the Court in this case. These *amici* simply request that the Court's opinion in this case not prejudice the consideration and resolution of these issues under the Act by local officials in a myriad of fact situations around the country. Such prejudice would doubtless result were this Court needlessly to repeat the Court of Appeals abstract reasoning regarding "curriculum-related[ness]" in general and Key Club in particular. This case does not involve the Equal Access Act, a school official's deliberate exercise of discretion under a "curriculum-related" standard, or even, apparently, an evidentiary record framed in light of such a standard. Nevertheless, a broad pronouncement by the Court in this case on the subject of "curriculum relatedness" would erroneously dominate future school officials' decisions as well as potential lower court litigation under the Act.[12]

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[12] *Cf.* Schauer, *"Private" Speech and the "Private" Forum: Givhan v. Western Line School District,* 1979 Sup. Ct. Rev. 217, 217:

> No amount of academic prattle about holdings, dicta, and ratio decidendi can dispel the fact that, in courts other than the Supreme Court, the law is what the Supreme Court says by its words as much as it is what the Court holds by its decisions.

CONCLUSION

Kiwanis International and Key Club International, as *amici curiae,* respectfully submit that in the event this Court finds it necessary to decide the free speech issue, the Court should hold, contrary to the Court of Appeal's opinion, that no public forum and therefore first amendment free speech right of access is shown by the facts surrounding the student activity period in this case. In no event should this Court affirm the Court of Appeal's generic "curriculum-related" standard for determining whether a high school's student activity period constitues a "public forum" under the first amendment. Finally, these *amici* respectfully request that given the enactment of the Equal Access Act, this Court not repeat the Court of Appeal's speculations on that legal standard in general or as applied to Key Club in particular.

Respectfully submitted,

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No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LISA BENDER, *et al*,
Petitioners,

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, *et al*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS IN THIS CASE

Concerned Women for America Education and Legal Defense Foundation is a national, non-profit membership organization with approximately 600,000 members. At its annual convention held in Washington, D.C. on September 14 and 15, 1984, it adopted the following resolution:

> We believe that the nation's public schools must once again respect equally the rights of students and teachers who have religious beliefs along with those who do not. The right to voluntarily pray, read the Bible, or meet for religious discussion is necessary to achieve such equal treatment. . . . We continue to support the principle of equal access for religious

student groups and call for vigorous enforcement of the law in this regard.

During 1984, Concerned Women for America publically supported the "Equal Access" law that passed Congress (20 U.S.C. § 4071). Representatives from Concerned Women for America actively asked members of Congress to support the bill. The issues in the case now before this Court are very similar to the ones embodied in the Equal Access law.

Concerned Women for America supports the request of Lisa Bender and the other student petitioners, that this Court reverse the Third Circuit Court of Appeals in *Bender* v. *Williamsport Area School District*, 741 F.2d 538 (3rd Cir. 1984).

I

TINKER AND WIDMAR CONTROL THE DECISION OF THIS CASE

The logical application of the holdings of two landmark decisions of this Court compels a ruling that the students should be allowed to meet in the high school's time of open forum for religious meetings. The cases are *Tinker* v. *Des Moines Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) and *Widmar* v. *Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). Although the Third Circuit mentioned and discussed both of these cases, your amicus would submit to this Court that the Third Circuit did not properly apply this Court's rationale from these two cases. Therefore, the circuit court reached the wrong decision in the case at bar.

We would submit that a proper understanding of the controlling principles of *Tinker* and *Widmar* dictate a reversal of the Third Circuit's decision.

Tinker v. Des Moines Community School District

In *Tinker*, this Court recognized that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] While this Court acknowledged the important interest the state has in maintaining discipline and order in the public schools[2], this Court has also ruled that the public schools must diligently safeguard the constitutional rights of the individual. Quoting with approval from *West Virginia* v. *Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), the Court said:

> That [the public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.
>
> —393 U.S. at 507.

This Court ruled that Mary Beth Tinker's action of wearing a black armband to protest U.S. involvement in Viet Nam was protected speech, and could not be prohibited unless it "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school."[3] A mere showing that the school desired "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"[4] could not justify a curtailment of the right of freedom of expression.

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[1] 393 U.S. at 506.

[2] 393 U.S. at 507.

[3] 393 U.S. at 509.

[4] Ibid.

The school officials in *Tinker* prohibited the wearing of the black armbands because they did not believe that the content of the ideas expressed were appropriate during the confines of the school day. There was no showing that they attempted to curtail Tinker's right to express her views at home or in other arenas such as her church. The school offered no evidence that the wearing of armbands would somehow disrupt the education process of the public schools in Des Moines. The Court said in *Tinker*:

> [Students] may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.
>
> —393 U.S. at 511.

Clearly, then, the students at Williamsport Area High School, and other public high schools, have the constitutional right to free expression in the public schools, unless their activities "materially and substantially" interfere with the requirements of appropriate discipline in the operation of the school. No evidence in the record even hints or implies that the Petros group would disrupt the normal functioning of the school day at Williamsport. Without such a showing, the rationale of *Tinker* demands that the students be allowed to exercise their First Amendment freedoms.

This Court said that the right of students to freely express themselves was appropriate in classroom discussions, as well as other times of the school day.

> A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam,

> if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others (citation omitted).
>
> —393 U.S. 512-13.

Therefore, the fact that the Williamsport students wanted to meet during the activity period does not change the constitutional analysis. Students have their constitutional rights from the first bell of the school day, through recess or lunch, until they are dismissed for home. In fact, the activity period at Williamsport Area High School would seem to be the most logical time to have the students meet for a Bible study-prayer meeting.

This Court made it clear that the right of free expression was not limited to symbolic speech such as the wearing of armbands. Lisa Bender and the other student-petitioners cannot be limited to wearing buttons saying, "Christ died for your sins." Such a limitation on *Tinker* is not justified. This Court said:

> The principle use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.
>
> —393 U.S. at 512.

The right to "personal intercommunications among the students" is the very right at stake in the case now at bar. It is premised not only on free expression, but on the right of freedom of assembly as well. This Court has never said that freedom of assembly is a "second class" right compared to the freedoms of speech and press. In fact, the Court has said the opposite, that "the right to peaceable

assembly is a right cognate to those of free speech and free press and is equally fundamental." *DeJonge* v. *Oregon*, 299 U.S. 353, 364-65, 57 S.Ct. 255, 81 L.Ed. 278 (1937).

When applied to the *Williamsport* facts, the *Tinker* principles militate favorable treatment of the students' rights to assemble for discussion of the Bible and prayer. If this type of activity constitutes free speech, then it cannot be curtailed unless there is evidence in the record which shows that the student Bible study meetings "materially or substantially interfere" with the functioning of the public school. No such evidence exists.

Widmar v. Vincent

This Court held that religious meetings of the type contemplated in Williamsport High School were protected speech under the First Amendment when held on public university campuses. *Widmar* v. *Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). The Court further ruled that the University of Missouri at Kansas City had established an open forum on campus for all student groups, so the university could not exclude one group based on the religious content of their speech, absent a compelling state interest that abridged the right by the least restrictive means.

The Court in *Widmar* clearly stated that religious speech and religious meetings are protected speech under the First Amendment:

> Here [the university] has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These forms of speech and association are protected by the First Amendment. See, e.g., *Heffron* v. *International Society for*

> *Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), *Niemotko* v. *Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951), *Saia* v. *New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948).
>
> —454 U.S. at 269.

The Court expressly rejected the reasoning that religious speech is not really speech, but worship, and is therefore, entitled to less constitutional protection (see 454 U.S. at 269, footnote 6). Clearly, students have the constitutional right to express their religious beliefs in meetings with like-minded individuals on a public school campus. This Court held that the University was not obligated to create an open forum, but since it did, it could not deny access to the forum to groups for unconstitutional reasons, i.e., because of the content of their speech:

> Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.
>
> —454 U.S. at 267-8.

The Third Circuit recognized in *Williamsport* that the high school had created an open forum for the students in the activity period, 741 F.2d at 549-50. Since the school created an open forum, the students' constitutional rights cannot be abridged due to the content of their speech, because religious speech is constitutionally protected speech under the First Amendment.

It should be noted that this Court expressly reserved the question of the applicability of its *Widmar* ruling to "younger students" in footnote 14, 454 U.S. at 274. This exception, however, was a part of the Court's Establish-

ment Clause discussion—a subject we treat below. There can be no question that whether it is in a high school open forum or a college open forum, this type of activity is constitutionally protected free speech. On the strength of *Tinker*, which is of course a high school case, activity that is constitutionally protected free speech, assembly, or free exercise of religion, cannot be curtailed unless there is a material and substantial disruption to the educational process. If there is a high school exception to the principle of *Widmar* it must be made in the Establishment Clause arena, for there is no logical distinction in the area of free speech.

II

THE THIRD CIRCUIT MISCONSTRUED THE ESTABLISHMENT CLAUSE AND USED CONJECTURE AND EVIDENCE NOT IN THE RECORD

The Third Circuit ruled against the students because they said it would violate the Establishment Clause for the public school to allow the students to meet. We respectfully suggest that the Third Circuit misapplied the tripartite Establishment Clause test, and based its decision on conjecture and evidence not in the record.

Since the right of students to meet for religious reasons in a public school is protected speech, the state can restrict it only when it has a compelling state interest, and then only by the least restrictive means, *Widmar* v. *Vincent*, supra, 454 U.S. at 270 and *Williamsport*, 741 F.2d at 550. In both *Widmar* and *Williamsport*, the schools asserted a compelling state interest of abiding by the Establishment Clause. This Court rejected that reasoning in *Widmar*, but the Third Circuit said it applied in *Williamsport* because of different facts.

This Court elaborated a three-part test to see if the state action violated the Establishment Clause. The test is:

1) Does the proposed action have a secular purpose?

2) Does the proposed action have a primary effect which neither advances nor inhibits religion?

3) Does the proposed action avoid excessive government entanglement with religion?

This test was, of course, derived from *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1970).

The Third Circuit said that Williamsport High School established the activity period for a secular purpose, and not to promote religion. Therefore, the activity period satisfied the first prong of the tripartite test.

The circuit court held that the prayer meeting would promote religion and excessively entangle the school in religious affairs and thus violate the "primary effect" test and the "excessive entanglement" test.

A substantial reason that the Third Circuit reached a positive conclusion as to the "secular purpose" test, but a negative conclusion for the "primary effect" and "excessive entanglement" test was that the court "switched horses in the middle of the stream." The court judged the religious neutrality of the "secular purpose test" by examining the secular purpose of the "creat[ion of] of the activity period." 741 F.2d at 551. But when examining the second and third prongs of the *Lemon* tripartite test, the court looked exclusively at the Petros student group rather than the entire activity period with the Petros group forming only one portion of the overall student activity program.

This Court recently rejected a similar attempt to segregate out a religious component of an overall governmental activity and to attack the religious portion of the activity on Establishment Clause grounds. In *Lynch* v. *Donnelly*, ___ U.S. ___, 103 S.Ct. 1776, 79 L.Ed. 2d 604 (1984), this Court held that the appropriate way to examine an Establishment Clause question was to look at the whole of the Christmas celebration, not just the nativity scene portion thereof.

We suggest that the correct way to examine the "primary effect" and "excessive entanglement" questions in Williamsport High School is set forth in *Lynch* v. *Donnelly*. The whole scheme must be examined. The religious component of an overall program must not be examined under a constitutional electron microscope.

It is not surprising that the *primary* effect of the religious group will be to advance its religious beliefs. That is a mere tautology. But the primary effect of the activity period is to accommodate the varied interests of its students, not to promote religion. Clearly, the activity period program's *primary* effect neither advances nor inhibits religion, because the Petros group was only one of many student groups meeting during the activity period.

The Third Circuit spoke speculatively and ominously about the "appearances" of having students praying in the public school, that it would somehow look like the state is promoting religion:

> In Williamsport, for instance, meetings of Petros would be held in a classroom which, a few minutes after the meeting, is also used for regular secular classes. Within this more restricted environment, therefore, involuntary contact between nonparticipating students and religious groups is inevitable. Students of differing or conflicting creeds

> would therefore be less able to overlook the activities of such a group within their school, and by the same token would be more likely to perceive a message of endorsement by school authorities that religious activities were approved.
>
> —741 F.2d at 552.

No evidence exists in the record for this speculative conclusion by the Third Circuit. Is it not as reasonable to say that students would learn tolerance and pluralism by seeing people of differing creeds meeting in a public school? Would this not teach students that we live in a nation of differing beliefs, and that we must learn to understand and tolerate them?

The notion that students will somehow think that the school is endorsing religion by accommodating the constitutional right of other students is totally unsupported in the record. The school is no more endorsing the religious beliefs of Petros by permitting them to exist than the Des Moines School District was taken an official anti-war stance by allowing Tinker to wear her armband. No evidence exists that high school students are more immature on the subject of religion than they are on the subject of international politics. Eighteen year-old high school seniors are no more impressionable than 19 year-old college freshmen. High school students would justifiably resent the notion that they must be allowed to hear every side of every issue except religion. In fact it is constitutionally permissible to teach comparative religion in public high schools. *School District of Abington* v. *Schempp*, 347 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d. 844 (1963).

Mature adults would have a difficult time understanding why comparative religion or the Bible as literature may be taught in the public schools, but a voluntary

student group may not meet for religious purposes. If any perception is logically created in the minds of students, it is that the public schools and courts are prejudiced against religion by banning groups like Petros. Such an inference is too dangerous to permit.

As this Court said in *Widmar*:

> An open forum in a public university does not confer any imprimatur of State approval on religious sects or practices. As the Court of Appeals [8th Circuit] quite aptly stated, such a policy "would no more commit the University . . . to religious goals," than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities. 635 F.2d at 1317
>
> —454 U.S. at 274.

There is no evidence in the record to suggest that this is any different from the situation in Williamsport. The primary effect of an open forum is to allow student expression on all subjects. The fact that a religious group is included sends no unconstitutional subliminal messages to students. Excluding such groups sends the stark message that religious speech is second class speech.

The Third Circuit convolutes the "primary effect" test into a "bad appearances" test, buttresses with some conjectures based only on the judges' perceptions, and finds the students' meetings at the high school unconstitutional. The Third Circuit's opinion that the student meetings violate the "primary effect" test is clearly erroneous.

The Third Circuit also found the student religious meetings excessively entangled the state in religion. The Court focused on the fact that a faculty advisor had to be present at the meetings. This teacher might give the

impression that the school endorses the Bible study[5] and that the teacher might be called upon to referee a doctrinal dispute between the students.[6]

Again, no evidence exists that students perceive teacher-advisors as giving state approval to a club meeting in the school. If this appearance is bad, the Third Circuit could have ordered a "least restrictive means" modification of the compelling state interest to avoid establishment of religion by allowing a parent to be the group's monitor. Instead, the Third Circuit rejected this suggestion with the unsupported assumption that "a parent undertaking the role of monitor would be perceived as a school authority," 741 F.2d at 552-3. No evidence supports this assumption, and it violates common sense. Hopefully, high school students understand the difference between school teachers who are state employees, and parents, who are not.

Therefore, on closer examination, it seems that the school has no compelling state interest in preventing an establishment of religion by prohibiting the students from meeting, because the program passes the *Lemon* tripartite test. No evidence offered to the Third Circuit from the lower court supports the conjectures it made to reach its decision.

Although the Third Circuit examined the appropriate precedents in its decision, it seems that its decision was not made on court precedents, but its perception of what will happen in Williamsport Area High School if the students meet to pray:

> Instead of uniting students from varying backgrounds and beliefs, prayer in the public schools

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[5] 741 F.2d at 552.

[6] 741 F.2d at 557.

> segregates students along religious lines. This works to the detriment of all students, and may particularly ostracize and stigmatize those students who are atheists or adhere to religious beliefs not shared by the majority of their fellow students. The peer pressure in a high school environment exaggerates the ostracism which may be experienced by nonconforming students, especially if they see student leaders or favorite teachers participating in the prayer club, see *Brandon* v. *Bd. of Ed.*, 635 F.2d at 978. Accordingly, we are of the view that, "Sacred practices of religious instruction and prayer [as] the Framers [of the Constitution] foresaw, are best left to private institutions—the family and houses of worship." Id at 973.
>
> —741 F.2d at 561.

This thinking permeates and flavors the Third Circuit opinion. Many of the statements quoted above, which come at the end of the opinion, are arbitrary speculations supported by no evidence in the record.

For example, there is no evidence that the Petros group created any strife when it announced that it would meet. No groups formed against it. The Third Circuit expresses its own fears that the prayer meeting will engender religious strife and convert the public school into the equivalent of Beirut, Lebanon.

Also, no evidence exists that non-Christian or atheist students would be stigmatized by the prayer-meeting students, or that students would feel compelled by peer pressure to attend the meetings if they saw student leaders or favorite teachers attending the meeting. If anything, peer pressure in today's average American high school would keep students *away* from the Bible study, not bring them to it.

If no evidence exists that the prayer meetings disrupt the schools, then they cannot be banned. The Third Circuit offers only its speculation that it might be disruptive and that religion is better left at home or in the house of worship.

But such a statement ignores the precedent of *Tinker* and *Widmar*. Students do not shed their constitutional rights at the schoolyard gate. If the prayer meetings are not disruptive, they cannot be prohibited. The Third Circuit is in fact contradicting *Tinker* and *Widmar* by saying that some constitutional rights are best shed at the schoolyard gate to be left at home or in the house of worship.

It is long-settled that courts decide cases on the evidence before it, not on speculations, assumptions and hypothetical results. The Third Circuit opinion seems to rest more on its own speculations concerning the inner-workings of the minds and hearts of high school students, than either the facts or sound constitutional analysis.

CONCLUSION

The Third Circuit erred in ruling against the students and upholding the prohibition on their school meetings. With powerful precedents such as *Tinker* and *Widmar*, the students' free speech, assembly, and free exercise rights can be limited only by the clear showing of a compelling state interest, and even then, the state may use only the least restrictive means to protect its compelling interest.

The school asserts a compelling state interest of preventing the establishment of religion. The school activity period program passes the tripartite test, and the student prayer meetings do not imply any government establishment of religion. Allowing the students to meet

shows that the government neutrally accommodates its citizens' constitutional rights. Such accommodation by the state of individual liberties should be encouraged and not supressed. The decision of the Third Circuit should be reversed.

May 6, 1985

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

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Petitioners,

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The United States Catholic Conference ("Conference") is a non-profit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigrant aid, pov-

erty assistance, civic education, youth activities, and communications. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States, particularly when the Religion Clauses of the Constitution are implicated.

This case presents an important opportunity to lay down a harmonious construction of the two Religion Clauses. The decision below on Establishment Clause grounds cannot be reconciled with the intent and purposes of both Religion Clauses. Reversal will serve both Clauses by accommodating voluntary student religious groups whose activity otherwise qualifies under criteria set by school authorities for student activity periods.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

This Court's most recent decisions have contributed a new cogency to Establishment Clause jurisprudence, according to "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, —— U.S. ——, 104 S.Ct. 1355, 1359 (1984); *see Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, 3069 (1983). This theme reinforces the suggestion in earlier decisions that "history and experience" form the analytical foundation for the resolution of Establishment Clause issues. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 802 (1973) (Burger, J., concurring and dissenting in part). The framers of the Establishment Clause intended "to state an objective not to write a statute." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).[1] The Clause does not derive its

[1] The first amendment of the Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ."

meaning through a "legalistic minuet in which precise rules and forms must govern." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Rather, its authentic role is discerned from the process and ideas that forged it. *Lynch v. Donnelly*, 104 S.Ct. at 1359, 1361. The renewed effort to apply the Establishment Clause in accord with its authentic purposes demands of a reviewing court "the ability and willingness to distinguish between real threat and mere shadow." *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 3337 (1983).

The Williamsport Area School District ("School") permitted regularly-scheduled voluntary student activity. The sole criteria were that the activity "contribute to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper." *Bender v. Williamsport Area School District*, 741 F.2d 538, 544 (3d Cir. 1984), *cert. granted*, 105 S.Ct. 1167 (1985) (No. 84-773). At the Williamsport Area High School, a student group called "Petros" was allowed to hold one meeting which about forty-five students attended. They read scripture and prayed. That was their last meeting before this litigation began. On advice of the School's lawyer, these students were excluded from the activity period on Establishment Clause grounds. It is undisputed that their activity met the School's other criteria.

These students were not merely discussing religion. They were engaged in the sharing of scripture and prayer, the classic and undeniable components of religious worship. To regard their activity as mere speech, and then to dispose of their rights *solely* under the rubric of the first amendment guarantee of free speech, is fundamental error which led the court of appeals to imprecise analysis and a wrong result. Clearly, the spectre of a violation of the Establishment Clause in this case demands a recognition that the fundamental right at stake is that specially protected by the other component of the

Religion Clauses, *i.e.*, the Free Exercise Clause. That done, reconciliation of private right and public concern is achieved by the harmonization of these two bulwarks of religious freedom. The requisite constitutional analysis is thus not burdened by a supposed conflict of competing policies rooted in relatively unrelated constitutional provisions (free speech vs. establishment).

The Religion Clauses were intended to be complementary protections for religious liberty. By definition, the free exercise of religion guaranteed under the first amendment promotes religious liberty. *Wisconsin v. Yoder*, 406 U.S. 205, 234, n.22 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). "[T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." *Wisconsin v. Yoder*, 406 U.S. at 214. "[I]t seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the framers. . . ." L. Tribe, *American Constitutional Law*, § 14-7, p. 834 (1978). The touchstone for analysis of conduct implicating the Religion Clauses must be whether religious liberty is or may be threatened by governmental action. *See Lynch v. Donnelly*, 104 S.Ct. at 1361. The Establishment Clause was intended to assure that government would never do so.

By prohibiting the Congress from enacting laws "respecting an establishment of religion," the framers intended to restrain the new federal government from interfering in matters of religious belief, practice, or governance, but yet to preserve to the states some measure of freedom to cooperate with churches in matters promoting the common good, and to the people, freedom to express religious and spiritual values. Given these purposes, this Court has stressed that a declaration of unconstitutionality should be made only when, by realistic

measure, the state is clearly and directly involved in religion. *See, e.g., Lynch v. Donnelly, supra; Walz v. Tax Commission*, 397 U.S. at 669. So guided, the government will accommodate religion, but avoid those relationships which threaten to undermine religious liberty by endorsing, preferring, suppressing, or directing a particular religious belief or action. *Zorach v. Clausen*, 343 U.S. 306, 314 (1952).

The Establishment Clause, properly understood in light of its authentic values and illuminating history, is not violated by permitting this student group to meet. What the School District and the court of appeals have disapproved is not a "real threat" to Establishment Clause values, nor even a cognizable "shadow" of a threat. *See Marsh v. Chambers, supra.* Authorizing the use of classroom space for a voluntary student religious group would not impermissibly thrust the state into religious activities, nor communicate the message of official endorsement for a particular religion or religious practice. That it conveys governmental accommodation of religion in general fully accords with the Religion Clauses, and the principle of accommodation established by this Court. *Cf. Zorach v. Clausen, supra.* Where, as here, the action is protected under the Free Exercise Clause, it cannot violate the Establishment Clause.

The majority opinion below followed a course of near-naked hostility toward religion in general, in opposition to the applicable principle of accommodation. The court believed "*any* practice which communicates sanction by the school of religious activity amounts to an Establishment Clause violation." 741 F.2d at 555 (emphasis added). Judge Adams said in dissent, the majority "sanction[ed] a policy singling out a religious group as the only student activity ever to be excluded in the high school's history." *Id.* at 565. The majority based its conclusion not on evidence of a genuine threat to authentic Establishment Clause values, but on specula-

tion regarding "possible perceptions" and a "potential for division." Such vague and unsupported conjecture is fundamentally inconsistent with this Court's admonition that reviewing courts not invalidate action under the Establishment Clause absent evidence of actual infringement of authentic constitutional values. *Marsh v. Chambers, supra.* The result below not only subverts the principle of accommodation rooted in the history and purposes of the Religion Clauses, but could well "teach youth to discount important principles of our Government as mere platitudes." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 637 (1943).

ARGUMENT

I

The Fundamental Right at Stake in This Case Is Not Only of Free Speech, But Also of Free Exercise of Religion. Because the Religion Clauses of the First Amendment Were Intended as Complementary Protections for Personal Religious Liberty, Action Protected under the Free Exercise Clause Cannot Violate the Establishment Clause.

This Court's most recent decisions have contributed a new cogency to its Religion Clause jurisprudence, rooting its interpretation of the Establishment Clause in "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly,* 104 S.Ct. at 1359. Thus, the Clause must not be interpreted through a "legalistic minuet in which precise rules and forms must govern" (*Lemon v. Kurtzman, supra*), but rather through fidelity to the process and ideas that forged it. *Lynch v. Donnelly,* 104 S.Ct. at 1359, 1361. Principal among these ideas is that the Establishment Clause complemented the Free Exercise Clause to assure comprehensive protection for religious liberty. An important corollary is that actions protected under the Free Exercise Clause cannot violate the Establishment Clause.

A. Student-Initiated Voluntary Prayer, Conceded as Appropriate to the Student Activity Period of the High School, Is Protected by the Free Exercise Clause.

The majority opinion of the court of appeals acknowledged that this voluntary student group was conducting "activity devoted to prayer." *Bender*, *supra*, 741 F.2d at 541. This reality is at the factual core of the constitutional issue in this case. This group desired to "promote spiritual growth and positive attitudes in the lives of its members;" their first and only meeting prior to this litigation was devoted to a sharing of scripture and prayer. *Id.* at 542-43. Further, the court of appeals also conceded that "religious discussion, religious study, and even prayer, fall within the articulated qualification [for access to the activity period] that student organizations promote the intellectual and social welfare of students. . . . The student members of Petros, therefore, have a valid first amendment interest to engage in their proposed activity." *Id.* at 549-50. Clearly, this case involves constitutionally protected religious activities *appropriate to the forum.*

The court of appeals erroneously limited the "valid first amendment interest" to a "free speech right to engage in religious activity." *Id.* at 559, *see also id.* at 554, 560. This Court has reserved decision on whether devotional exercises of a voluntary student group, appropriate to the forum, are *also* protected by the Free Exercise Clause. *Widmar v. Vincent*, 454 U.S. 263, 273 n.13 (1982).[2] "[T]he Free Exercise Clause . . . , by its terms, gives special protection to the exercise of religion." *Thomas*

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[2] As a commentator on Religion Clause decisions has suggested, access cases can reasonably be viewed as implicating free speech, free exercise, and establishment concerns. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 Cal.L.Rev. 817, 820-21 (1984).

v. Review Board, 450 U.S. 707, 713 (1980). The Clause embraces religious speech to which the framers accorded a specific guarantee. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629 (1980), *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940). "[T]he right to free exercise of religion unquestionably encompasses the right to preach, proselytize, and perform other similar religious functions." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality). Similarly, it unquestionably includes prayer, scripture reading, and other acts of devotion and ritual. *See Zorach v. Clausen*, 343 U.S. at 313.

It is true that "free exercise" does not mean "the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Cantwell v. Connecticut*, 310 U.S. at 304, 305. However, when prayer and similar devotion are appropriate to the time and place (*id.*), as is undisputed in this case, the Free Exercise Clause guarantees broad protections which can be displaced only by a substantial showing of a competing and compelling state interest. *Thomas v. Review Board*, 450 U.S. at 718.

The proper resolution of the issues in this case requires consideration of the Free Exercise Clause, particularly in its relationship to the Establishment Clause. Both are so bound up together in their history and purpose that the court of appeal's failure to do so was serious error (discussed at pp. 19-20, *infra*). The discussion that follows demonstrates that the Religion Clauses, harmoniously construed and applied, require reversal of the judgment below.

Prior Relevant Briefs of this Amicus.

This brief is the fourth filed by this *amicus* in the last three terms for the purpose of assisting the Court's analysis and interpretation of the Religion Clauses, in par-

ticular the Establishment Clause.[3] It has presented analysis both of the history of the Clauses, the most detailed being in *Mueller v. Allen*, and of the utility and structure of the *Lemon* three-part test, particularly in *School District of Grand Rapids v. Ball* and *Aguilar v. Felton*, both *sub judice*. Although the discussion which follows is sufficient for the purposes of this case, it may be supplemented by reference to the earlier filings.

B. The Framers Intended That the Religion Clauses Be Construed and Applied Harmoniously as Complementary Protections of Religious Liberty.

The Establishment and Free Exercise Clauses were intended by the framers to be complementary and provide comprehensive protection for religious liberty. "[T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." *Wisconsin v. Yoder*, 406 U.S. at 214. The religious freedom guarantees of the Bill of Rights:

> were adopted not as a protection *from* religion, but rather as a protection *for* religion. They were inserted in our Constitution largely because its framers felt that they were important to ensure the continuance and the strengthening of religion, which could not flourish under American conditions if any State Church were either provided for or tolerated.[4]

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[3] It has filed in *Mueller v. Allen*, 463 U.S. 388 (1983); *School District of Grand Rapids v. Ball, cert. granted*, 104 S.Ct. 1412 (1984) (No. 83-990); and *Aguilar v. Felton, jurisdiction postponed*, 105 S.Ct. 241 (1984) (Nos. 84-237, 238, 239). *Grand Rapids* and *Felton* were argued December 5, 1984.

[4] I A. Stokes, *Church and State in the United States*, 556 (1950).

Both components of the Religion Clauses were meant to work to the same end. If the Establishment Clause component is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to bar accommodation of activities which serve the public good and pose no properly cognizable threat to the religious freedom of any person.

1. *The Establishment Clause Carefully Reflects the Precise Intent and Judgment of the Framers, Based on History and Experience, That There Should Be No Governmentally Preferred and That the Government Should Not Interfere in Religious Belief, Practice, or Governance.*

The meaning and precise objectives of the Establishment Clause clearly emerge when its terms are considered in light of history, in particular the legislative drafting process. The prohibition of an establishment or preference of one or more religions by the new federal government was the specific concern of four of the five States which requested such an amendment when they ratified the Constitution.[5] As expressed by Madison, the sponsor

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[5] During the ratification process some states expressed concern because the Constitution did not explicitly protect the civil liberties of the people. New Hampshire, New York, North Carolina, Rhode Island and Virginia specifically addressed the issue of religious freedom in their ratifying acts. Four states (New Hampshire excepted) also addressed the issue of a prohibition against an established religion, in terms of preferring one religion over others. I Debates on the Adoption of the Federal Constitution 328 (2d ed. J. Elliott ed. 1836) (New York), *id.* 334 (Rhode Island), III *id.* 659 (Virginia), and IV *id.* 244 (North Carolina). However, many, including Madison, believed that religion was not the province of the new government and that further clarification was not needed. III *id.* 330. Madison argued that the religious diversity of the new country made preference politically untenable. *Id. See generally* 1 *Annals of Congress* 731 (Gales & Seaton eds. 1789).

in the House, the "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Congress* 730 (Gales & Seaton eds. 1789). He also observed that the amendment had been required by some state conventions which feared the Constitution might have given the Congress authority to make laws that "might infringe the rights of conscience and establish a national religion." *Id.*[6]

There was no tension or doubt related to these objectives, but the choice of words to achieve them did engender certain anxieties born of other concerns. Thus a reference to "national" religion contained in an earlier draft of the Establishment Clause (*see infra* note 9) evoked fears of an implication that the new government would be "national" and not "federal." [7] More important for present purposes was the concern that the new government might interfere with the autonomy of the states in religious matters, a point of particular interest to those states which approved a particular religion to one degree or another.[8] The Religion Clauses that emerged from this

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[6] *See also* 1 *Annals, supra* note 5, at 432-36. Madison also stated a popular fear that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 731.

[7] Comments during debates, *id.* at 731. More than one commentator has noted the importance of the national-state issue to the development of the Establishment Clause. *See* Corwin, *The Supreme Court As National School Board,* 14 Law and Contempt. Probs. 3, 10 (1949); M. Malbin, *Religion and Politics—The Intention of the Authors of the First Amendment,* 7 (1978); III J. Story, *Commentaries on the Constitution of the United States,* 731 (1833).

[8] Except for Madison, the most active participants in the House debate (Gerry, Huntington, and Livermore) came from the states (Connecticut, Massachusetts, and New Hampshire) that maintained a religious establishment in one form or another.

process were a House-Senate compromise.[9] The language finally selected satisfied the major objectives of the recommending states as noted by Madison (text accompanying

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[9]

HOUSE LANGUAGE	SENATE LANGUAGE
Madison's Proposal—June 8 The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.	September 3 Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.
Select Committee—July 18 No religion shall be established by law, nor shall the equal rights of conscience be infringed.	Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.
Livermore's Language—August 15 Congress shall make no laws touching religion, or infringing the rights of conscience.	Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.
Ames Language—August 20 Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.	Congress shall make no law establishing religion or prohibiting the free exercise thereof.
Final Text—August 24 Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.	Final Text—September 9 Congress shall make no law establishing articles of faith or a mode of worship or prohibiting the free exercise of religion. . . .

COMPROMISE

Congress shall make no law
respecting an establishment of religion,
or prohibiting the free
exercise thereof . . . .

note 6, *supra*), but respected the other concerns of his peers.

The phrase "respecting an establishment" had two purposes, first to prevent Congress from establishing or favoring a national religion, and second to prevent Congress from interfering with a state's policies with regard to religion.[10] The phrase "respecting an establishment" cannot reasonably be read to mean merely concerning or touching upon religion. Indeed, that was the terminology proposal by Livermore which was eventually rejected by the House.[11] The word "establish" was *consistently* used to refer to federally-preferred religion in the amendments recommended by the states, by Madison in the House debates, and in versions of the measure in both House and Senate. Notes 5, 6, and 9, *supra*.

There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was intended to suggest less than "an establishment of religion." The language of the Clause does not concern itself with religion in general, but with the particular problem of an establishment of *a* religion. There was no concern expressed during the House debates that Congress might enact a law beneficial to religion or religious institutions. 1 *Annals of Congress*, *supra* at 730-31.[12] Had this been

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[10] 1 *Annals*, *supra* note 5, at 730-31; *see* Corwin, *supra* note 7, at 11. "Respecting an establishment" meant more than the act of preference but a restraint on Congress' control over practices and beliefs. I Stokes, *supra* note 4, at 539-40. As noted Congress was prohibited from passing laws affecting state establishments. Malbin, *supra* note 7, at 16.

[11] Note 9, *supra*. Although Livermore's proposal passed on August 15, 1789 without any recorded debate, it was not the language eventually adopted by the House. 1 *Annals*, *supra* note 5, at 731, 765, 778.

[12] In *Marsh v. Chambers*, this Court reviewed actions of the First Congress which were beneficial to religion. 103 S.Ct. 3330, 3333 (Chaplains), 3334 n.9 (Thanksgiving Holiday) (1983). *See also* Northwest Ordinance, Art. III, Ch. VIII, 1789 *Stat.* 50, 53.

the concern it could have been dealt with simply by providing that "Congress shall make no law respecting religion", without introducing the more limited concept of "an establishment of religion." *See* note 9, *supra*. As already noted, that approach suggested by Livermore was rejected.

The drafting process reflected the framers' experience with the historical realities of church-state entanglement. About half a century later, the Senate Judiciary Committee adverted to that experience when it rejected a citizen's petition urging that provisions for legislative and military chaplains should be abolished as an "establishment of religion." In its Report in 1853, the Committee explained that " 'establishment of religion' . . . referred, without doubt, to that establishment which existed in the mother country." S. Rep. No. 376, 32d Cong., 1st Sess. 1 (1853). It meant:

> the connexion[sic] with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances.

Id. This description provides a strong summary and important interpretation of the historical church-state involvement which led to the Establishment Clause. This description strikingly parallels that found in recent decisions such as *Lynch v. Donnelly*, 104 S.Ct. at 1366 (O'Connor, J., concurring) and *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982).[13]

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[13] *See Johnson*, 72 Cal.L.Rev. *supra* note 2, at 817 and n. 2. Recently this Court has given renewed importance to the implications of colonial history as reflected in the generative process that forged the Religion Clauses. Johnson, *supra*. *See Lynch v. Donnelly*, 104 S.Ct. 1355 (1984); *Marsh v. Chambers*, *supra*; *Mueller v. Allen*, 103 S.Ct. 3062 (1983).

2. ***The Establishment Clause Was Intended to Buttress the Free Exercise Clause. Applications Which Burden Religious Liberty Are Inconsistent with the Intent of the Framers and Are Necessarily Erroneous.***

As part of the Bill of Rights, the Establishment Clause was intended to safeguard individual liberty. *See Wisconsin v. Yoder*, 406 U.S. at 214. The same is true under the fourteenth amendment which applied the Establishment Clause to the states. *See Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). As detailed above, the Clause reflects the experience of its framers that officially preferred or established religion generates religious intolerance and infringes upon personal liberty. *E.g.*, *School District of Abington Township v. Schempp*, 374 U.S. 203, 221-22 (1963); *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). The Establishment Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious liberty. *See, e.g., Lynch v. Donnelly*, 104 S.Ct. at 1364.

Although the Religion Clauses enjoin the government to be neutral in relationships among sects, the two Religion Clauses require a benevolent neutrality which (a) accommodates the spiritual needs of the people (Free Exercise) but also (b) avoids official preference or support for particular religions (Establishment). *See Walz v. Tax Commission*, 397 U.S. at 669. As much as the framers were "utterly opposed to any constraint upon the rights of conscience," they "had no fear or jealously of religion itself, nor did they wish to see us an irreligious people. . . ." S. Rep. No. 376, *supra* at 4.[14] Justice Goldberg echoed this attitude in his concurring opinion in *Schempp*, *supra*, 374 U.S. at 305:

> Neither government nor this Court can or should ignore the significance of the fact that a vast por-

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[14] *See also* I Stokes, *supra* note 4.

> tion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.

In his *Commentaries*, Justice Story emphasized that the framers plainly believed that religion and morality are intimately connected with the well-being of the state and are essential to the administration of civil justice.[15] In addition, Justice Story expressed the view that "universal approbation" would have met any attempt by the government to "level all religions" and hold all in similar indifference.[16]

The framers of our Constitution plainly believed that religion, morality, and ethics are an important part of the core education for new citizens. In his Farewell Address, President Washington indicated that "religion and morality are indispensable supports" for political prosperity. Washington's Farewell Address, *reprinted in* 131 Cong. Rec. S. 1372 (Daily Ed. Feb. 18, 1985). "Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience forbid us to expect national morality can prevail in exclusion of religious principles." *Id.* Likewise, although Jefferson used the "wall of separation" metaphor, he often avowed that religious training was a necessary prerequisite for the formation of the democratic citizen. A. Howard, et al., *Church, State, and Politics*, 78-80 (1981).[17] As Rector of the University of Virginia,

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[15] III Story, *supra* note 7, at 722-23. *See Zorach v. Clausen*, 343 U.S. 306, 312 (1952).

[16] III Story, *supra* note 7, at 726.

[17] The need for education in values, morality, and civic virtue in the schools is echoed still today by, among others, Chief Justice

Jefferson requested and received approval for various religions to establish schools of theology on the public university campus. *See McCollum v. Board of Education*, 333 U.S. 203, 245-46 and nn. 11-13 (1948) (Reed, J., dissenting) (quoting extensively from Jefferson's writings on this point). In the First Congress many actions, including the support for religion in education incorporated into the Northwest Ordinance, mark the dedication of the framers to the importance of religious values in government (*supra* note 12).

C. The Principle of "Accommodation" Is the Key to an Establishment Clause Analysis Which Serves Authentic Constitutional Goals.

These and many other writings and actions of the framers compel the conclusion that the Constitution "affirmatively mandates accommodation, not mere tolerance, of all religions and forbids hostility to any." *Lynch v. Donnelly*, 104 S.Ct. at 1359. There is no requirement that the Government "throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clausen*, 343 U.S. at 314. In fact, in *Zorach*, *id.* at 313-14, Justice Douglas succinctly stated the principles which should guide decision in this case:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee a freedom to worship as one chooses. We make room for a wide variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious

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Burger. *See* Burger, *Address to the American Bar Association*, 67 A.B.A.J. 290, 291 (1981). The Williamsport student group attempted to provide that kind of discussion of values that Chief Justice Burger has addressed as an element missing in our American school system.

> instruction or cooperates with religions by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their needs. To hold that it may not would be to find in the Constitution a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

As this Court more recently noted, when official actions happen to correspond with religion, it does not "establish" religion, but "is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh v. Chambers*, 103 S.Ct. at 3335, 3336. Accommodation neither implicates nor violates the Establishment Clause, but works to further the aims for which *both* the Establishment Clause and the Free Exercise Clause were intended, namely, the preservation of religious liberty and the encouragement of the rights of conscience.[18]

So too, in furtherance of these aims, the Free Exercise Clause protects broadly the liberty to engage in such devotions or other forms of worship that a person may choose. *See Cantwell v. Connecticut*, 310 U.S. at 303. Religious activity, appropriate to the time and place and not at odds with the liberty of another, may not be displaced unless there is a countervailing and compelling governmental interest to be served. *Thomas v. Review Board, supra*; *Wisconsin v. Yoder*, 406 U.S. at 215. A

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[18] In *Reed v. Van Hoven*, the District Court examined this Court's teachings on prayer in public schools and negotiated an accommodation for voluntary student prayer in the public schools. 237 F. Supp. 48 (W. D. Mi. 1965). The court believed that the students should be allowed to read and pray scriptures, so long as there was no compulsion. *Id.* at 54-57. In particular, the District Judge recommended to the students that they read the writings of presidents and other documents of American history for their explication of religious teachings and values.

fear that accommodation of religious activity would violate the Establishment Clause has been rejected as a compelling rationale for, among other things, denial of unemployment assistance [*Sherbert v. Verner*, 374 U.S. at 409], compulsory school attendance [*Wisconsin v. Yoder*, 406 U.S. at 220-21], and disqualification of clergy from public office [*McDaniel v. Paty*, 435 U.S. at 626 (plurality) and at 638-39 (Brennan, J., concurring)].

As one contemporary commentator of note has stated, "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the framers." Tribe, *American Constitutional Law*, *supra*. A construction of the Religion Clauses which subordinated the Free Exercise Clause to the Establishment Clause would ignore the generative history of the Clauses. More than that, given their joint placement in the first phrase of the Bill of Rights, it would be a logical absurdity and an abuse of basic principle.

II

The Court of Appeals' Application of the Establishment Clause Violated the Free Exercise Clause, Contrary to the History and Purposes of the Religion Clauses. Accommodation of the Student Religious Activity in This Case Promotes Religious Liberty and Is Entirely Consistent with the Establishment Clause.

The court of appeals was sorely pressed to give cogency to its Establishment Clause analysis. *Bender*, *supra*, 741 F.2d at 559-60. In significant part, this resulted from its failure to consider the Free Exercise Clause, to harmonize that Clause with the Establishment Clause, and to analyze the latter according to "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 104 S.Ct. at 1359.

A "free exercise" claim was made by the students in the district court, but not on appeal. The court of appeals was aware of that. 741 F.2d at 541, n.1. It also sensed its responsibility to conduct an "independent ap-

pellate review" of the record, *id.* at 542, n.3, and is presumed to have known that an appellate court has the further duty to apply the "*correct* law" to the record and "pass upon issues not pressed before it or raised below when the ends of justice will be best served by doing so." *Empire Life Insurance Co. v. Valdak Corp.*, 468 F.2d 330, 334 (5th Cir. 1972), *citing Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941).[19] Indeed, cases implicating first amendment guarantees demand particular scrutiny to assure that those rights are not infringed. *Bose Corp. v. Consumers' Union*, —— U.S. ——, 104 S.Ct. 1949, 1958, 1964, 1965 (1984). Yet, the court of appeals failed to consider the Free Exercise Clause as the primary source of what it described as the "valid first amendment interest" of this voluntary student prayer group.

In this relative analytical vacuum, the majority reached an erroneous result, moved by a few amorphous insights and sheer conjecture. It felt that to permit the students to meet, even without active support from the School, nevertheless "creates the perception among school children that the State has approved a religious activity and thus has placed its imprimatur on religion." 741 F.2d at 555. On that basis, and with no satisfactory explanation of the perceived dangers, the court decided that merely to allow those students the use of a classroom, and to engage a monitor to check attendance, would have the "primary effect" of advancing religion, and would "excessively entangle" the state with religion in violation of the Establishment Clause. *E.g.*, *id.* at 558. Finally, and most distressing, the court also believed that "once activity is found to be religious . . . , then the potential for divisiveness and sectarian dispute is raised, no matter how accommodating the actual practice may be." *Id.* at 554.

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[19] *Cf. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n. 12 (1981) (narrowness of issues in *certiorari* petition not a bar to resolution of "those questions . . . necessary for proper resolution of the case").

Those conclusions are substantially flawed and clearly erroneous in terms of legitimate constitutional analysis based on the authentic purposes of the Religion Clauses.

A. The Court of Appeals Unnecessarily *and* Erroneously Applied the Three-Part Test to Activity Protected under the Free Exercise Clause.

Because this Court has refused "to be confined to any single test or criterion in this sensitive area," the court of appeals should have assessed if the "three-part" test [20] is "relevant" to judging whether the Establishment Clause is violated in this case. *Lynch v. Donnelly*, 104 S.Ct. at 1362. Further, once it decided to apply that test, the court was obliged to do so in a principled way, consistent with history and experience. *See id.* at 1359. And finally, it was duty-bound not to suppress the "valid first amendment interest" of those students because of a "mere shadow" of constitutional concern, but only if a "real threat" to authentic constitutional values were established by the record. *Marsh v. Chambers*, 103 S.Ct. at 3337.

The voluntary student activity in this case is protected under the Free Exercise Clause as religious activity conceded to be appropriate to the school's activity period (discussed at pp. 7-8, *supra*). Properly harmonized with the Free Exercise Clause, in accord with the authentic purposes of the Religion Clauses, the Establishment Clause may not be applied to subvert legitimate Free Exercise rights (discussed at pp. 15, 17-19, *supra*). If the majority below had recognized the Free Exercise implications of the student activity and the interrelation-

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[20] This Court has applied a three-part test to determine whether the Establishment Clause is violated, *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In order to be sustained, first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one which neither advances nor inhibits religion; and third, the statute must not foster excessive government entanglement with religion.

ship of the two Religion Clauses, recourse to the three-part test would not have been necessary. Rather, it would have judged the instant case to be like *Marsh v. Chambers* in which this Court did not employ the three-part test, but, guided by the dictates of history and experience, held that legislative chaplains are part of the fabric of our constitutional history and entirely consistent with the Establishment Clause.

Even if it were appropriate to employ the three-part test, the court below had the duty to do so in a principled manner, based on the evidence and not on supposition and speculation. Like other courts which have proceeded to decision without the requisite guidance from history,[21] the majority below foundered in its Establishment Clause analysis. The purpose of the three-part test is to aid courts in evaluating "legislation or official conduct to determine whether, *in reality*, it establishes *a* religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 104 S.Ct. at 1361 (emphasis added). The court of appeals' conclusions that both the "primary effect" and "excessive entanglement" criteria were violated were not tied to evidence of a threat to authentic Establishment Clause values.

As for the "primary effect" component of the three-part test, the majority believed that "*any* practice which communicates sanction by the school of religious activity amounts to an Establishment Clause violation." 741 F.2d

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[21] For example, this Court in *Lynch v. Donnelly* and *Marsh v. Chambers* reversed determinations by the courts of appeals made without adequate consideration of the relevant history and experience embodied in the Establishment Clause. This *amicus* has devoted much effort in support of the interpretation of the Establishment Clause consistent with its historical roots. See text *supra* at. . . . The instant case is yet another where the three-part test was invoked to invalidate conduct on the basis of *speculation* of a *perceived* threat to the Constitution. Such applications trivialize the analysis and overlook this Court's efforts to clarify the Religion Clauses according to what history teaches are their authentic purposes. *See Lynch v. Donnelly*, 104 S.Ct. at 1359.

at 555 (emphasis added). The ostensible factual basis for this conclusion was "a possible perception by adolescent students that government is communicating a message of endorsement of religion." *Id.* at 552. This starkly hostile view of religion violates the spirit and letter of the Religion Clauses and the principle of accommodation. *Lynch v. Donnelly*, 104 S.Ct. at 1359. It alters the Establishment Clause from a proscription of sectarian preference to a proscription of accommodation of religion generally.

The majority feared that accommodation would be misperceived by the students as a state imprimatur on religion. This was expressed as concern that high school students would be susceptible to indoctrination by subtle "religious" pressures. This conclusion is not only unsupported by reason and experience, but also refuted by the materials cited by the majority. Thus, research discussed in the *Yale Law Journal* about religious speech public schools indicates that young people are quite capable of understanding and distinguishing that which is officially sanctioned from that which is not. Comment, *The Constitutional Dimensions of Student-Initiated Religion Activity in Public High Schools*, 92 Yale L.J. 499, 507-09 (1983), *cited* 741 F.2d at 554, n.23. As Judge Adams said in dissent below, *id.* at 565 (footnotes omitted):

> To be sure, broad generalizations about the maturity of high school students should not be erected as constitutional principle. But where, as here, the school has officially recognized that its students are sufficiently mature to benefit from two 30-minute periods per week committed to student-initiated activities, and where the school's evaluation of its students' maturity is borne out by their independent decisions to participate in a wide range of activities, a court may properly conclude that at least these students are capable of distinguishing the creation of a student forum from approval of the ideas expressed at any particular meetings. In the words

> of *Widmar*, I "doubt students could draw any *reasonable* inference of [school] support from the mere fact of a campus meeting place." 454 U.S. at 274 n. 14, 102 S.Ct. at 276.

As for the "entanglement" component of the "three-part" test, the majority was concerned that the presence of monitors would place it "in a position of governance over religious activity." 741 F.2d at 556. According to the court, "governance" would consist of the presence of a monitor to keep attendance and order and perform incidental tasks to assure "no religiously oriented material was posted on the bulletin board, published in the school newspaper, or announced over the public address system." *Id.* at 556. These actions do not remotely approach the threshold of unconstitutionality. This Court has approved attendance checks by teachers, including a report by a religious official, as a permissible accommodation under the Establishment Clause. *Zorach v. Clausen*, 343 U.S. at 313. Further, if the student activity itself is constitutionally protected and appropriate, bulletin board announcements and the like could hardly be independently objectionable.

Finally, as for the divisiveness aspect of the "excessive entanglement" criterion, this Court has stated that divisiveness does not serve an analytical purpose except in a case involving public aid to private schools. *Mueller v. Allen*, 103 S.Ct. at 3071, n.11. Yet, the court of appeals thought that the presence of religious activity "would promote an impermissible atmosphere of religious partisanship in a public secondary school which the Establishment Clause requires must be free of such divisiveness." 741 F.2d at 560, 561. In point of fact, the court's conclusions are aimed at *all* religious student activity, not governmental preferment. Further, absent evidence of division or disruption,[22] it is the court, not the student

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[22] Division and disruption of institutions is often cited as a basis for some limitations on constitutional rights. The character of

activity, that raises the spectre of division and partisanship from action otherwise protected under the Free Exercise Clause. In *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508-09 (1969), this Court stressed that protected speech may not be restrained absent a showing that it will substantially disrupt order:

> Any word spoken, in class, in the lunch room, or on campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk [*citing, Terminiello v. Chicago*;[23]] and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

See Board of Education of Island Trees v. Pico, 457 U.S. 853, 868 (1982) (plurality). Soo too should this apply to religious expression.

It is interesting that the court of appeals considered "divisiveness" also in connection with the "primary effect" component of the three-part test. 741 F.2d at 554-55. Not only is that application foreign to the rationale of the cases decided by this Court, but it illustrates what this *amicus* has questioned in prior briefs (discussed at pp. 8-9, *supra*), particularly in *Aguilar v. Felton*, *supra:* Should the three-part test yield to a two-part "purpose and effect" analysis rooted in the authentic history and purposes of the Religion Clauses? This

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public schools as "public institutions" affects the way in which courts, including this Court, deal with claims that constitutional rights are being infringed. J. Jacobs, *Individual Rights and Institutional Authority: Prisons, Mental Hospitals, Schools and Military*, xxi-xxiii, 1-2 (1978). A limitation is sustained only when the exercise of a right is incompatible with the order and discipline of the institution. *E.g., New Jersey v. T.L.O.*, —— U.S. ——, 105 S.Ct. 733, 742-43 (1985) (discussing range of disruptive actions in schools).

[23] 337 U.S. 1 (1949).

amicus respectfully suggests that an affirmative response by the Court would be an important jurisprudential step in aid of the adjudicatory process in Establishment Clause cases.

The court of appeals unnecessarily, and erroneously, applied the three-part test enunciated in *Lemon v. Kurtzman, supra* note 20, as applied and refined in recent cases such as *Lynch v. Donnelly, supra* and *Mueller v. Allen, supra.*

B. The Result Below Is Opposed to the Authentic Values of the Religion Clauses, and to Religion Itself. Accommodation of this Voluntary Student Prayer Group Would Not Violate the Establishment Clause.

To accommodate this student prayer group would imply no official sanction of religion which the Establishment Clause was meant to prohibit. The decision below takes the issue beyond a "wall of separation" and erects, instead, a barrier of hostility to religion. It proclaims a rule of intolerance, namely, that religious expression, however voluntary, orderly or otherwise appropriate it may be, has no place in a public high school. This is an especially dangerous precedent because it withdraws religious values from the educational process at a time when values are formed and conscience is molded. *See* note 17, *supra.*

> [T]o be silent about religion may be, in effect, to make the public school an antireligious factor in the community. Silence creates the impression in the minds of the young that religion is unimportant and has nothing to contribute to the solution of the perennial and ultimate problems of human life.

American Council on Education, *The Function of the Public Schools in Dealing With Religion*, 6 (1953). *See* S. Rep. No. 357, 98th Cong., 2d Sess. 14-21 (1984). The majority's view is fundamentally inconsistent with our history and constitution. Suppression of these delicate

fundamental rights could well "teach youth to discount important principles of our Government as mere platitudes." *West Virginia Board of Education v. Barnette*, *supra*.

In *Zorach v. Clausen*, 343 U.S. at 313-14, this Court settled the principles which govern here: The Religion Clauses guarantee the freedom to worship, a freedom which extends to religious discussion and instruction; the state may encourage and cooperate in those actions as an accommodation permitted under the Clauses, in deference to the spiritual needs of the people. When it does so, it does not establish or prefer a religion in violation of the authentic purpose of the Establishment Clause.

Contrary to the view of the majority below (741 F.2d at 553), this case is not like *McCollum v. Board of Education*, 333 U.S. at 209-10, where the school was affirmatively involved in facilitating formal sectarian instruction during the school day. Here, the student activity is non-denominational and entirely voluntary. Neither is the instant case like others involving student groups which demanded a special meeting space to pray in the absence of a general program of student activity. *See Collins v. Chandler Unified School District*, 644 F.2d 759, 762-63 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981); *Brandon v. Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). Here, the School provided an open period for activities which promote the intellectual and social development of students, a criterion which this student group indisputably satisfied.[24] 741 F.2d at 549.

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[24] Last year President Reagan signed into law a bill requiring that, as a condition of receiving federal aid, school districts with activity periods open to student groups not deny equal access to voluntary student groups like Petros. Pub. L. 98-377, 98 *Stat.* 1302, §§ 801-805 (1984). In that legislation, Congress addressed what it perceived was official hostility (or at least trepidation) toward religion. S. Rep. No. 357, 98th Cong., 2d Sess. 14-21 (1984). The actions rejected by the court of appeals here would plainly be among those the Congress believes should be accommodated.

Prayer and similar devotional student activity *appropriate to the forum* is protected by the Free Exercise Clause and must therefore be accommodated under the Religion Clauses. In cases like *Cantwell v. Connecticut, supra*; *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953); and *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); this Court held the Free Exercise Clause protected religious activity against exclusion from a place open to other similar activities.[25] Although public high schools are not precisely in the category of the parks and streets in the cited cases, like that of the religious groups in those cases, the activity of the students here was appropriate to the forum. Thus, the principle of those cases clearly enjoins the School to admit this student group to a forum in which its activity is otherwise concededly appropriate. *See* 741 F.2d at 549. Religion itself may not be sole criterion for denial of access to a publicly-allocated benefit. *See McDaniel v. Paty, supra.*[26] As Judge Adams

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[25] The discriminatory denial of the use of parks to religious groups abridged both the exercise of religious liberty and free speech as applied to the states under the Equal Protection Clause. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951). Any doubt about the first amendment underpinning of these decisions is resolved by Justice Frankfurter's concurrence in *Fowler, supra*, and in *Niemotko v. Maryland*, 340 U.S. at 284, in which he specifically declined to join the Court's opinions on any rationale other than Equal Protection. That *Larson v. Valente*, 456 U.S. 228 (1982), disposed of similar discrimination on Establishment Clause grounds does not show any infirmity in the constitutional doctrine of these earlier cases, but simply that both Clauses work together to preserve religious liberty.

[26] *McDaniel v. Paty*, 435 U.S. 618 (1978), is but one example of government action that violates the Free Exercise Clause by singling out religion for adverse treatment. J. Choper, *et al.*, *The Supreme Court: Trends and Developments 1982-83*, at 72-73 (1984). *Cf. Speiser v. Randall*, 357 U.S. 513, 518 (1958) (denial of tax exemption for engaging in certain speech penalizes free speech and is therefore constitutionally forbidden). Recently, the same kind of excess characterized the Washington Supreme Court's denial of equally available student aid based on the student's religious pro-

said in dissent, the majority "sanction[ed] a policy singling out a religious group as the only student activity ever to be excluded in the high school's history." 741 F.2d at 565. Accommodation, not hostility, should have marked the decision below.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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gram of instruction. *See Witters v. Washington Commission for the Blind*, 102 Wash. 2d 624, 689 P.2d 53 (1984), *cert. granted*, 105 S.Ct. 1863 (1985) (No. 84-1070).

No. 84-773

IN THE

Supreme Court of the United States

October Term, 1984

Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,

MICHAEL BENDER, et al.,
Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA, THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE PETITIONERS

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-773

MICHAEL BENDER, et al.,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA, THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICI CURIAE[1]

This case presents important issues concerning individual free speech rights and the constitutional necessity of the state to recognize and accommodate religious pluralism and diversity in the operation of America's public

[1]Counsel of record to the parties in the case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

schools. The Rutherford Institute is greatly concerned about the implications for religious freedom and tolerance raised by the Court of Appeals' decision in this case.

The Rutherford Institute believes that the Court of Appeals erred when it upheld the Williamsport school board policy prohibiting students from meeting voluntarily during a self-directed student activity period solely because of the religious content of their speech. The activity period, which clearly did not advance religion, merely provided a time for students to meet freely for self-directed activity. It manifestly recognized in neutral fashion the freedom of each student to utilize the activity period in the manner he or she individually chose. Consequently, it did not infringe upon religious conscience or constitute state-sanctioned or endorsed religion.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With state chapters in Alabama, Georgia, Minnesota, Montana, Tennessee, Texas and Virginia, and its national office in Manassas, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment religious freedoms. Counsel for *Amici Curiae* have specialized in constitutional litigation in state and federal courts, including the Religion Clauses of the First Amendment, and have participated as counsel for *amici curiae* in previous cases before this Court. Counsel John W. Whitehead has argued and served as special constitutional consultant in numerous First Amendment cases and has authored several books and law review articles that focus on interpretation and application of the First Amendment Religion Clauses. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici curiae adopt by reference the statement of facts as set forth in Petitioners' brief filed with this Court. However, the following findings of the District Court should also be carefully considered by this Court in deciding this case:

> This is not a case where school administrators have adopted a rule or policy requiring, or even allowing, students to meet for religious purposes. This is not a case where a school teacher or other school official has adopted a practice of requiring or encouraging school prayer or other religious discussion in his classroom. It is not a case where a teacher or other school official encouraged or counselled the students to request the opportunity to meet during the activity period. It is not a case where the students represent a particular religious denomination. Rather, in this case, a number of students, acting voluntarily and free of outside influences, have requested permission to form a club and meet during the school's activity period on the same basis as other student organizations. The request was denied on the sole ground that the students wish to engage in religious speech. This decision was not based on a judgment regarding curricular choices or concerns of discipline and order. It was based solely upon the belief that the school board cannot exercise power to grant the request without contravening the United States Constitution.

Bender v. *Williamsport Area School District*, 563 F. Supp. 697, 698-699 (M.D. Pa. 1983).

SUMMARY OF ARGUMENT

In prior cases, this Court has relied upon the intent of the Framers of the Bill of Rights for understanding the meaning and reach of the Establishment Clause. The historical record shows that the climate of the revolutionary

and founding periods was fundamentally religious and favored government accommodation of religious practices. Both Thomas Jefferson and James Madison, often cited for their disestablishmentarian views, in fact tolerated and approved numerous religious practices in the public schools and in public life. Jefferson, for example, was President of the School Board of the District of Columbia where the Bible and the Watts Hymnals were used as primary texts. Moreover, our national history is replete with examples of government, in a spirit of toleration and accommodation, recognizing America's religious tradition and culture, but without infringing on the rights of conscience of those who do not subscribe to particular tenets of that tradition or culture.

The principles announced by this Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981) and *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969) should control the disposition of this case. The school district has created a "free" period for independent student activity. Having done so, it may not then discriminate against some students solely on account of the content of their speech. Once access for voluntary, self-directed free speech activity is accorded to some, it should be accorded to all. Moreover, there is no constitutionally valid reason why an "open forum" in a public high school should be treated differently than one in a public university. There is no implied state sponsorship of religious activity in an open forum policy, neither is there any state-mandated or endorsed religious exercise. Student meetings are wholly voluntary, without violation of conscience. Under these circumstances the school district cannot be said to lend its prestige, power or influence to religious thought or expression. Rather, it has affirmatively accommodated religion and non-religion, without favoritism or hostility. *Lynch v. Donnelly*, ____U.S.

____, 104 S. Ct. 1355 (1984). This approach properly advances the free speech rights of all students without imposing upon the rights of conscience of others.

ARGUMENT

I.

Permitting A Student Religious Organization To Meet Voluntarily In A Public High School Does Not Conflict With The Intentions Of The Framers Of The First Amendment As Revealed In Their Words, Deeds And History.

In Religion Clause adjudication, no less than any other area of law, Justice Oliver Wendell Holmes' statement is most fitting: "A page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). The determination of "the ultimate constitutional objective" as expressed by the Framers and *"as illuminated by history"* is of particular relevance here. *Lynch* v. *Donnelly*, ___U.S. ___ , ___ , 104 S. Ct. 1355, 1361 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Walz* v. *Tax Commission*, 397 U.S. 664, 671 (1970). Because of this basic constitutional presupposition, concrete, specific historical evidence of the Framers' views on religion and religious practices in public education must be placed at a premium to understand the reach and meaning of the First Amendment Religion Clauses.

History provides varied and ample evidence that among the Founders of this Republic the universal sentiment towards religion was one of *accommodation*. Public education was no exception. For example, the Continental Congress enacted the Northwest Ordinance on July 13, 1787. That ordinance, in part, provided:

> *Religion*, morality, and knowledge being essential to good government and the happiness of mankind,

> *schools and the means of education* shall forever be encouraged.

Ord. of 1787, July 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927) (emphasis supplied). This early acknowledgement of the relationship between religion and education bespeaks a clear intent that religion, instead of being segregated from the educational process, was, in fact, inseparable from the educational process. It is also significant that on August 7, 1789 (after the agreement to the final wording of the First Amendment Religion Clauses and the other provisions of the Bill of Rights), the Congress of the newly formed Federal government reenacted the Northwest Ordinance. *An Act to provide for the Government of the Territory Northwest of the river Ohio* (Northwest Ordinance), Ch. 8, 1 Stat. 50-51 (Peters ed. 1845). Any public school policy that fails to accommodate the diverse religious tradition of the American people is, therefore, at odds with the mandate for education found in the Northwest Ordinance.

The views of Thomas Jefferson and James Madison have been previously recognized by this Court as most instructive in determining the meaning and reach of the Religion Clauses. *Everson* v. *Board of Education*, 330 U.S. 1 (1947). Although Thomas Jefferson can in no sense be regarded as a Framer of the First Amendment, this Court, in its early Religion Clause cases, has adopted the view that "the framers spoke in a wholly Jeffersonian dialect and those who ratified it fully understood that style of speech." M. Howe, *The Garden and the Wilderness* 10 (1965).[2] At the time of the drafting and adoption

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[2]Antieau, Downey and Roberts note, however, that: "[T]he First Amendment was hardly the exclusive product of any one person. Subsequent interpretations of the Amendment should not be controlled by the singular statements of Madison [or] Jefferson . . . . An

of the First Amendment, Jefferson was in France. However, through his correspondence with James Madison, his influence was at least partially felt.

In many ways, the views of Madison and Jefferson were *not* representative of those of the Framers of the Constitution. Both Madison and Jefferson were from Virginia and were central figures in the fight in that state for the disestablishment of the Church of England. *See Everson* v. *Board of Education*, 330 U.S. at 11-13 and 33-42 and *Engel* v. *Vitale*, 370 U.S. 421, 428-429 (1962).[3] Not all states, however, shared Madison's and Jefferson's fervor for disestablishment. As this Court has previously noted, at the outbreak of the Revolutionary War, "there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five." *Engel* v. *Vitale*, 370 U.S. at 428.

Although the adoption of the Fourteenth Amendment eventually resulted in the Establishment Clause being made applicable against the States,[4] the historically di-

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examination of the early activities of the Federal Government indicates that the people approved and welcomed its aid to church related activities . . . . There was undoubtedly the faith that subsequent generations of Americans would be able to utilize the power of the Federal Government to promote the concurrent interests of government and religion under First Amendment norms that were reasonable, pragmatic, and just." C. Antieau, A. Downey and E. Roberts, *Freedom From Federal Establishment* 207-209 (1964).

[3]Both Madison's *Memorial and Remonstrance Against Religious Assessments*, written in 1785 in opposition to legislation which would use Virginia's public funds to pay teachers of the Christian religion, and Jefferson's *Bill for Establishing Religious Freedom* in Virginia, proposed in 1779 and enacted in 1786 were central documents to these disestablishmentarian forces.

[4]Historical evidence of the Framers' intent is made no less relevant by the adoption of the Fourteenth Amendment. In *Marsh* v. *Chambers*, 463 U.S. 783, ___ , 103 S. Ct. 3330, 3335, (1983) this Court said:

> In applying the First Amendment to the states through the 14th Amendment, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), it

verse record of state church establishment nevertheless illustrates that the term "establishment" in the First Amendment had an *institutional* meaning: "[t]he real object of the [first] amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government." *Lynch v. Donnelly*, ___U.S. at ___ , 104 S. Ct. at 1361, *citing* 2 J. Story, *Commentaries on the Constitution of the United States* 593-595 (2d ed., 1851). As Jefferson's often quoted expression stated, the Religion Clauses were to build "a wall of separation between *Church* and *State*." 8 *Works of Thomas Jefferson* 113 (Washington ed. 1861) (emphasis supplied). No wall of separation was intended, however, even by Jefferson, to seal religion hermetically from governmental or public activities. Rather, the *institution* of the church was to be isolated from the *institution* of the state. As Jefferson stated in 1817:

> If by *religion*, we are to understand *sectarian dogmas*, in which no two of them agree, then your exclamation on that hypothesis is just, "that this would be the best of all possible worlds, if there were no religion in it." But if the moral precepts, innate in man, and made a part of his physical constitution, as necessary for a social being . . . in which all agree, constitute true religion, then, without it, this would be, as you again say, "something not fit to be named even, indeed, a Hell."

15 *The Writings of Thomas Jefferson* 109 (Memorial Ed. 1904). Indeed, it must be noted: "Probably, at the time of the adoption of the constitution, and of the amendment to it now under consideration, the general if not the

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would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the states than the draftsman imposed upon the Federal Government.

universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship." J. Story, *supra; see also* H. Black, *Constitutional Law* 515 (4th ed., 1927) and T. Cooley, *Principles of Constitutional Law* 224 (1893). The First Amendment was, therefore, imbued by the Framers with amicability, not hostility, to the free exercise of religion. This was the *shibboleth* of that era.

That this sort of accommodation of religious freedom was compatible with the alleged "separationist" views of Thomas Jefferson was particularly evident in Jefferson's actions in the field of education. Jefferson as President repeatedly departed from the fastidious separationism which revisionist historians have attributed to him. For example, on three separate occasions, Jefferson signed into law extensions of a land grant given by the Federal government specifically to promote education and proselytizing amongst the Indians. R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 41-46 (1982).[5] Further, In 1803, President Jefferson proposed to the United States Senate a treaty with the Kaskaskia Indians in which the Federal government would agree to "give annually for seven years one hundred dollars towards the support of a priest" and "further give the sum of three dollars to assist the said tribe in the erection of a church." *A Treaty Between the United States of America and the Kaskaskia Tribe of*

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[5]*An act regulating the grants of land appropriated for military services, and for the society of the United Brethren for propagating the gospel among the heathen, and for other purposes*, as extended by: *An Act in addition to an act, intitled etc.*, Ch. 30, 2 Stat. 155-156 (Peters ed. 1845); *An Act to revive and continue in force, etc., and for other purposes*, Ch. 30, 2 Stat. 236-237 (Peters ed. 1845); and *An Act granting further time for locating military land warrants, and for other purposes*, Ch. 26, 2 Stat. 271-272 (Peters ed. 1845).

Indians, 7 Stat. 78-79 (Peters ed. 1846). The treaty was ratified on December 23, 1803, and included a specific appropriation for a Catholic mission, *at President Jefferson's request.*

Jefferson's involvement in the *accommodation* of the religious nature of the American people was not limited to Federal grants for the education and proselytizing of Indians. *It extended as well to general public education.*

Jefferson was the founder of the University of Virginia. From its inception, in 1819, the school was governed, managed and controlled by the Commonwealth of Virginia. The question of the constitutional limitations with respect to the teaching of the Christian religion at the University of Virginia was presented to him. In his annual report as Rector to the President and Directors of the Literary Fund of the University of Virginia dated October 7, 1822, approved by the Visitors of the University of whom James Madison was one, Mr. Jefferson set forth his views in detail as follows:

> The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in general institution of the useful sciences. . . . *A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science.* . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, *to establish their religious schools on the confines of the University,* so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for religious professions on as high a standing of science, and of

> personal weight and respectability, as may be obtained by others from the benefits of the University. Such establishments would offer the further and great advantage of *enabling the students of the University to attend religious exercise with the professor of their particular sect, whether in rooms of the building still to be erected, and destined to that purpose under impartial regulations,* as proposed in the same report of the commissioners, *or in the lecturing room of such professor.* . . . . Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion. . . .

19 *The Writings of Thomas Jefferson* 414-17 (Memorial ed., 1904) (Emphasis supplied). Simply put, Thomas Jefferson was not opposed to religious worship and study being conducted on the premises of a public educational institution. To the contrary, in order to perpetuate and accommodate the religious beliefs and exercise of students at the public University of Virginia, he recommended that students be allowed to meet on the campus to pray, worship and be instructed together or, if need be, to meet and pray with their professors. He wanted only to "exclude the public authorities from the domain of religious freedom," i.e. from prescribing religious expression. Surely, Jefferson would not have objected to voluntary, self-directed prayer, worship or instruction by students on the premises of a public school.[6]

It is also significant that when Congress initially authorized the public schools for the nation's capital, the first president of the school board was Jefferson himself. J.O. Wilson, *Public Schools of Washington,* 1 Records

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[6]James Madison was a Member of the Board of Visitors which approved the report Jefferson made as Rector, providing a vivid indication of Madison's views on the constitutionality of voluntary religious worship and education in public schools.

of the Columbia Historical Society 4 (1897). In fact, he "was the chief author of the first plan of public education adopted for the City of Washington." *Id.* at 5. The first official report on file indicates that the Bible and the Watts Hymnal were the principal, if not the only, books then in use for reading by the public school student. *Id.* at 9.

If this Court is to maintain at least some semblance of allegiance to history and the intentions of the Framers, it will vigorously protect the Petitioners' freedom to associate voluntarily in public secondary schools for self-directed religious activity. To rule otherwise would distort the law and run contrary to the wishes of the very men who drafted the document upon which we base our freedoms.

II.

Permitting A Student Religious Organization To Meet Voluntarily In A Public High School Is An Example Of Affirmatively Mandated Accomodation.

First Amendment neutrality *mandates* that the public school present no affront to the spiritual needs and concerns of its students. Denying the rights of the student in the present case would have two "chilling effects" on the First Amendment rights of students. First, it would prefer those who believe in no religion over those who believe. Second, it would subjugate the Free Exercise Clause to Establishment Clause interests,[7] thus contradicting the original intention of the Framers of the First Amendment.

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[7]As Paul Kauper has written: "If the protection afforded in the name of religious freedom against a state-prescribed, non-theistic orthodoxy is that a person cannot be compelled to participate, whereas the protection afforded in the name of the establishment clause is that a person may demand that any exercise promoting theistic belief be completely eliminated, the result is that the freedom protected by the establishment clause is regarded as having a higher value than the freedom protected by the free exercise clause."

It is obvious that governmental actions which are "simply a tolerable acknowledgement of beliefs widely held among the people of this country," are not *per se* an establishment of religion. *Marsh* v. *Chambers*, 463 U.S. at ___ , 103 S. Ct. at 3336. It is equally clear that the "limits of permissible state accommodation are by no means co-extensive with the non-interference mandate by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. *See Sherbert* v. *Verner*, 374 U.S. 398, 423 (1963) (Harlan, J. dissenting); *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961)." *Walz* v. *Tax Commission*, 397 U.S. at 673. "There is room for play in the joints productive of benevolent neutrality" towards religion. *Id.* at 669. This benevolence is mandated in the present case.

Professor Alfred North Whitehead has pointed out that education is an essentially religious inquiry. A. N. Whitehead, *The Aims of Education* 26 (1952). Education, as contrasted with vocational training, requires an examination and discussion of fundamental values. Government schools obviously intrude into the area of religion with courses in comparative religion, philosophy, ethics, sex education and values clarification. As Professor Giannella notes:

> Unlike . . . other areas, formal public education does not involve a pattern of regulation in which the place of religion can be derived from secular categories . . . education directly touches upon religious concerns, such as the meaning of existence and the sources and nature of human values.

Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development—Part II*, 81 Harv. L. Rev. 513, 561 (1968).

Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1030, 1063 (1962).

Because of this entrance of the state into the precinct of religion, it is constitutionally impermissible for government fanatically to seal religious expression from the public schools. Such a secularization would prefer nonbelief over belief. *Zorach* v. *Clauson*, 343 U.S. at 314. Moreover, the Constitution does not require "complete separation of church and state; it *affirmatively mandates accommodation*, not merely toleration, of all religions, and forbids hostility towards any." *Lynch* v. *Donnelly*, ___U.S. at ___ , 104 S. Ct. at 1359 (emphasis supplied).

The requirement of affirmatively mandated accommodation is particularly relevant in education. Just as state-prescribed religious exercises could convey—indeed inculcate—doctrines contrary to the views of the children's parents, here the placing of the governmental hand upon the shoulder of a young religious adherent for freely holding and expressing religious views would be equally inappropriate. In the past, this Court has sought to "sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma". *Zorach v. Clauson*, 343 U.S. at 313-314. No more than that would be undertaken here in permitting equal access for self-directed religious activity on the same basis as other student activities.

III.

Permitting A Student Religious Organization To Meet Voluntarily In A Public High School On The Same Basis As Other Student Activities Does Not Violate The Establishment Clause.

The law of the case at bar should be drawn from this Court's precedents in *Widmar* v. *Vincent*, 454 U.S. 263 (1981) and *Tinker v. Des Moines Independent School District* 393 U.S. 503 (1969). Both the Court of Appeals

majority and Judge Arlin M. Adams, in dissent, recognized the strong similarities between this case and *Widmar*. *See Williamsport Area School District* v. *Bender*, 741 F. 2d 538, 547 and 562. The majority stated:

> *Widmar*, of course, bears many similarities to the present case, at least insofar as the students' free speech rights are concerned. In both situations, there exists a policy of open access to state-owned facilities in an educational setting, a policy which certainly implies the existence of some type of forum. Indeed it is the very nature and purpose of any school, be it college or high school, to communicate knowledge. The fact that *Widmar* involved a *university*, while we here are concerned with a *high school*, does not mean we are free to ignore the nature of the free speech rights enjoyed by the students.

741 F. 2d at 547 (citations omitted). Thus, the only real difference between this case and *Widmar* is the setting, a public high school rather than a university. The issue for decision is whether and to what extent the First Amendment rights of secondary school students are less protected than those of university students.

A. First Amendment Rights In A Public High School May Be Restricted Only By Disciplinary Requirements, Certain Well-Defined State Constitutional Obligations and Reasonable Time, Place and Manner Regulations.

This Court has stated that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Widmar* v. *Vincent*, 454 U.S. at 267-268, n. 5, *citing Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 506 (1969). The Court has called for "care and restraint" in judicial interposition in the operation of the public school system. *Epperson v. Arkansas*, 393 U.S. 97, 164 (1968); *Board of Education*,

Island Trees v. *Pico*, 457 U.S. 853, 864, 866 (1982); *New Jersey, Petitioner v. T.L.O.*, ___U.S. ___ , 53 U.S.L.W. 4083, 4088, n. 9 (January 15, 1985). Deference to the judgment of school officials has been the rule. *Id.* However, when important constitutional safeguards are threatened, the Court has also declared that "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960). Lack of vigilance would, as this Court has stated, "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes", *West Virginia* v. *Barnette*, 319 U.S. 624, 637 (1943), and further, "cast a pall of orthodoxy over the classroom." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967).

It is axiomatic that students "do not shed their rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Independent School District*, 393 U.S. at 506; *West Virginia* v. *Barnette*, 319 U.S. 624 (1943). To limit or restrict such rights, the state must (1) demonstrate a compelling interest in maintaining discipline and standards of conduct conducive to learning in the public schools, *Tinker* v. *Des Moines Independent School District*, 393 U.S. at 513, or in complying with the state's own constitutional obligations *Widmar* v. *Vincent* 454 U.S. at 271, or (2) promulgate reasonable time, place and manner regulations governing the speech in question. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Widmar* v. *Vincent*, 454 U.S. at 271. Further, any such limitation or restriction must be "narrowly drawn to achieve that end." *Id., citing Carey* v. *Brown*, 447 U.S. 455, 461, 464-465 (1980). The sole interest advanced by Respondents in this case is that the Establishment Clause precludes the school board from permitting Petitioners to meet on the same basis as other

student organizations simply because Petitioners wish to engage in religious association and speech. *See Bender* v. *Williamsport Area School District*, 563 F. Supp. 697, 699 (M.D. Pa. 1983).

B. The Court Of Appeals Has Failed to Distinguish The Law of This Case From The Important First Amendment Principles Set Forth In *Widmar* v. *Vincent*.

In the *Widmar* case, this Court found no Establishment Clause infirmity in an "open forum" policy at a public university, using the tri-partite test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1970). In this case, however, two judges of the Court of Appeals ruled that the primary effect of an open forum in a high school environment would impermissibly advance religion and engender excessive entanglement with religion. The Court of Appeals majority distinguished this Court's "primary effect" analysis in *Widmar*, finding what it termed "heightened dangers" in a high school environment, namely:

> (1) High school students stand in a very different position than university students in terms of maturity and impressionability, in part, because the State in the high school environment "stand[s] in large measure, *in loco parentis*."
>
> (2) Religious meetings in high school present a "more obvious presence" because of compulsory attendance laws and the more structured and controlled environment, resulting in involuntary contact between nonparticipating students and religious groups.
>
> (3) The presence of a monitor, whether teacher, parent or other adult, imparts the impression of the state's approval of the student religious meetings.

741 F. 2d at 552-553. The majority was also influenced by the distinction it perceived between the use of public

classrooms and the use of off-campus locations for religious activities, citing *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) and Zorach v. *Clauson*, 343 U.S. 306 (1952). It viewed this distinction as an obvious and constitutionally significant "bright line" that would enjoin the proposed student religious activity. For the reasons expressed below, the majority is wrong on all counts.

First, in the absence of a direct, state-prescribed or initiated religious practice, constitutional doctrine should not depend upon judicial perceptions of the "maturity" or "impressionability" of secondary school students. Judge Adams was correct to warn of the dangers inherent in "vague impressions of the emotional sophistication of high school students." 741 F. 2d at 563. Judgments of this latter sort "should be made by academicians, not by federal judges." *Widmar* v. *Vincent*, 454 U.S. at 278-279 (Stevens, J. concurring). Williamsport school officials have determined that Williamsport students are sufficiently mature and independent for voluntary, self-directed activities in furtherance of "intellectual, physical or social development." There being a forum for such activities, the state may not then discriminate against students who decide to utilize state-granted freedom for activities with religious overtones. *Perry Education Association* v. *Perry Local Educator's Association*, 460 U.S. 37, 45-46 (1983). As this Court clearly stated in *Tinker*, ". . . students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." 393 U.S. at 511.

The majority suggested that the school district stands *in loco parentis* to high school students, somehow furthering the "impression" that the district endorses *all* activities that take place on its premises. *See* 741 F. 2d at 554. The *in loco parentis* concept was squarely rejected, however, in *New Jersey, Petitioner* v. *T.L.O.*, ____U.S.

____ , 53 U.S.L.W. at 4086, where the Court acknowledged "[t]his reasoning is in tension with contemporary reality and the teachings of this Court." *Accord, Wisconsin* v. *Yoder*, 406 U.S. 205, 229-234 (1972). As Judge Adams commented, "it is inconsistent to accept, on the one hand, a level of intellectual sophistication among high school students sufficient to consider and contribute to the exchange of controversial views and yet, on the other hand, to declare them incapable of discerning the distinction between a school's creation of a public forum that may permit religious speech and an endorsement of such activity." 741 F. 2nd at 564-565. Moreover, it is equally facile to conclude that compulsory attendance laws "compel" or unduly influence students to participate in voluntary, student-directed religious activities. The activities held during the free period were diverse and numerous. Participation was wholly voluntary. There was no compulsion to participate, nor was there any untoward influence. If anything, the very policy the majority advocates, that of excluding religious groups, "may in fact be understood as a manifestation of official hostility toward religion," clearly proscribed by the First Amendment. 741 F. 2d at 565 (Adams, J. dissenting); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 222 (1963); *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1970); *Lynch* v. *Donnelly* ____U.S. ____ , ____ , 104 S. Ct. 1355, 1366 (1984) (O'Connor, J. concurring). "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel* v. *Paty*, 433 U.S. 618, 641 (1978) (Brennan, J. concurring).

The majority also contended that there would be a more "obvious" presence of religious groups on a high

school campus, thereby increasing the likelihood of "involuntary contact" by nonparticipating students. This Court has previously indicated in *Tinker* that First Amendment rights should not be permitted to depend upon "undifferentiated fear or apprehension of disturbance." *Tinker* v. *Des Moines Independent School District*, 393 U.S. at 508. In *Tinker*, this Court acknowledged that:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. *But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.*

Id. at 509 (citation omitted; emphasis added). Indeed, the purpose of school is to train and develop youth for citizenship and individual fulfillment "in the pluralistic, often contentious society in which they will soon be adult members". *Board of Education, Island Trees* v. *Pico*, 457 U.S. 853, 868 (1982); *Ambach* v. *Norwick*, 441 U.S. 68, 76-77 (1979). The school room is a "market place of ideas." *Tinker* v. *Des Moines Independent School District*, 393 U.S. at 512. This is the goal of the pluralism we profess. The State's accommodation of all creeds, while espousing none, cannot help but to further intellectual and social development, as well as the values of pluralism, religious tolerance and religious liberty. To hold otherwise in the context of this case would "impose a crabbed reading of the [religion] clauses on the country," *Lynch* v. *Donnelly*, ____U.S. at ____ , 104 S. Ct. at

1366, stifling the diverse traditions and dynamics that have made this country great. As Judge Adams so eloquently stated in dissent:

> One of the great triumphs of America's constitutional experiment has been the avoidance of religious factionalism in the political sphere. Our country's continued progress in this endeavor ultimately depends on the individual citizen's tolerance and respect for religious diversity. When the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, I believe the Constitution and the Nation are the better for it.

741 F. 2d at 569-570.

The majority's objection to the presence of a neutral "monitor" at student activities is based solely on speculation. However, the only purpose of a monitor is to "insure orderly meetings," *Bender* v. *Williamsport Area School District*, 563 F. Supp. at 715, not to participate in such meetings. A monitor (whether teacher, administrator or otherwise) is, as the District Court recognized, no more than "the functional equivalent of a policeman at a religious rally held in a public park." *Id.* There is nothing in the record at trial that would suggest otherwise. The clearly defined role of the monitor in this case manifestly avoids the appearance of state endorsement of the activity in question.

In the absence of direct state prescription of religious instruction or exercises, it is clear that an "open forum" or "equal access" policy in public secondary schools would not violate Establishment Clause principles. *See Widmar* v. *Vincent*, 454 U.S. 263 (1981). There is no state sponsorship. No particular religious exercise is sanctioned by the schools. No student is required to practice a religious exercise or to attend religious instruction.

Student meetings are wholly voluntary and without violation of conscience in any respect.

Moreover, an "open forum" or "equal access" policy is unquestionably neutral. There is no favoritism. There is no "religious gerrymander." The state is not lending its prestige, power or influence to religious thought or expression. There is absolute neutrality between religion and religion, and religion and non-religion. As in *Widmar*, there is a proper balance between Establishment, Free Speech and Free Exercise. To decide otherwise would "ignore the fundamental differences between self-initiated and state-sponsored religious activity," 741 F. 2d at 538 (Adams, J. dissenting), and denigrate the First Amendment rights of students who choose to use the free period for religious speech.[8]

C. The Court of Appeals Has Overstated And Oversimplified The Significance Of The Distinction Between The *McCollum* And Zorach Cases.

Not only has the Court of Appeals majority failed to establish any persuasive basis on which to distinguish the *Widmar* case, it has also overstated and oversimplified the significance of any distinction between this

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[8]The Court of Appeals majority also concluded, as a matter of law and fact, that the Establishment Clause provides a compelling state interest which would override any free speech rights in this case. In making this finding, the Court of Appeals concluded, in part, that:

> Public schools have never been a forum for religious expression. The free speech right enjoyed by the students is therefore of a dramatically different character than the right to communicate in a traditional public forum such as a park or on a sidewalk, or through the press, where the overriding importance of allowing free expression has been deeply and firmly rooted throughout our history.

741 F. 2d at 560. This gross generalization should not be permitted to charade as constitutional law or fact. The historical record is abundantly clear that the public schools have *always* been a forum for religious expression of one form or another. *See* the historical

Court's decisions in *McCollum v. Board of Education*, 333 U.S. 203 (1948) and *Zorach v. Clauson*, 343 U.S. 306 (1952).

Zorach permitted "released time" religious instruction off-campus, whereas *McCollum* forbade similar activities on-campus. Unlike the present case, neither of those cases involved a state-created "open forum". The infringement upon individual First Amendment rights is far more onerous in the present case. Moreover, to conclude that the *geography* of the activity is the operative distinction between the cases is simplistic to the extreme and not supported by the case law. In *McCollum*, as well as in the later cases of *Engel* v. *Vitale*, *Abington School District* v. *Schempp* and *Stone* v. *Graham*,[9] the state clearly stood behind the content of the doctrinal teaching or exercise. In each, the government was actively *sponsoring* religion or *prescribing* religious exercises or practices on its premises as an integral part of the school curriculum. By contrast, in *Zorach*, the activities were not curricular in nature. They were not mandated or re-

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discussion in Part I of this Brief; *cf. Widmar v. Vincent*, 454 U.S. 263 (1981); *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963).

The Court of Appeals also failed to address adequately the requirement of *Widmar* that state action restricting free speech be "narrowly drawn to achieve [the desired] end." 454 U.S. at 271. In this case, the school district denied *all* access to school premises for religious activities, stating that "present law simply does not permit public schools to authorize or support religious activities on school property." See Appendix A to Petitioners' Petition for A Writ of Certiorari at 6a. Such a blanket prohibition of religious meetings on school premises is constitutionally overbroad.

[9]In *Engel*, 370 U.S. 421 (1962), the Court ruled unconstitutional a state-prescribed nondenominational prayer for public schools. In *Schempp*, 374 U.S. 203 (1963), the Court forbade state-prescribed Bible readings in public schools. In *Stone*, 449 U.S. 39 (1980), the Court outlawed the state-prescribed posting of the Ten Commandments in Kentucky school rooms.

quired by the state, but were rather voluntary. Each student was "left to his own desires as to the manner or time of his religious devotions, if any." 342 U.S. at 311. The force of the school system was not used to advance the religious instruction involved.

The fallacy of any geographical distinction was plainly exposed by Justice Brennan in his concurring opinion in *Schempp*. He explained that the real issue in *McCollum* was placing the religious instructor in the same position of authority as the secular teacher in the public school classroom, "lending to the support of sectarian instruction all the authority of the governmentally operated public school system." 374 U.S. at 263. He continued:

> To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

374 U.S. at 263. This Court further distinguished *McCollum* in the *Widmar* case, noting that the school in *McCollum* appeared to sponsor the views of the speaker because school facilities were made available exclusively to religious instructors, but not to others. 454 U.S. at 271 n. 10. This is not the case here.

D. THERE IS NO ENTANGLEMENT PROBLEM PRESENTED HERE.

The entanglement prong of the *Lemon* "test" is not violated in this case. This Court has identified greater entanglement dangers in attempts to enforce exclusion of religious speech from a public forum. *Widmar* v. *Vincent*, 454 U.S. at 272, n. 11. The agreement by the religious group in this case to forego use of the school bulletin boards, public address system, newspaper and

yearbook presents a clear-cut policy capable of administration without entanglement. Any "entanglement" arising from the presence of a "monitor" would be wholly speculative and, in any event, as the District Court pointed out, very limited. 563 F. Supp. at 715. "There is nothing here . . . like the 'comprehensive, discriminating, and continuing state surveillance' or 'enduring entanglement' present in *Lemon*." *Lynch* v. *Donnelly*, ____ U.S. ____, ____, 104 S. Ct. 1355, 1364 (1984) (citation omitted). Neither is there the type of direct subsidy which merits inquiry into potential political divisiveness. *Id.*, *citing Mueller* v. *Allen* 463 U.S. 388, ____, n. 11, 103 S. Ct. 3062, 3071, n. 11 (1983). In short, there is no constitutionally significant entanglement problem presented by this case.

CONCLUSION

If the school district had chosen to accommodate the free speech and religious interests of the Williamsport students, it would not have had a religious purpose for doing so, but rather the purpose of maintaining good relations with its students (while ensuring their constitutional rights), the purpose of acknowledging our Nation's diverse religious culture, or the purpose of accommodating the First Amendment rights of *all* students without discrimination. And if the district had chosen to accommodate those interests, it would not have advanced religion, but rather *passively* acknowledged (as opposed to actively prescribed) religious practices or exercises. *Walz* v. *Tax Commission*, 397 U.S. at 668.

It would not be enough, however, for the decision in this case to merely point out these obvious truths. For decades and even to this day, notwithstanding *Widmar*, American educators and students have labored under the dark shadow of the layman's belief that the United States

Supreme Court has ruled that nothing of a religious nature can take place on the campus of a publicly supported educational institution even if there is no connection between the activity and the school. And this, despite the fact that Justice Tom Clark, the author of the opinion in *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), attempted on various occasions to make clear that "the Court has specifically held only one thing with specific reference to prayer in the public schools and that is that a *required* prayer in the public school violates the Establishment Clause" (published official transcript of Justice Clark's address on November 5, 1964, as the featured speaker of a symposium on "*Religion and Public Schools*" at Wartburg College, Waverly, Iowa (November 5, 1964), at 46).

Unfortunately, the school district has specifically singled out the students in the student group known as "Petros" and has denied them their constitutional rights. In the process, students in this group have been denigrated and relegated to the position of second class citizens in a school system which is required by law to treat them neutrally, not with hostility.

It is urged that this Court put to rest in the strongest possible terms the insidious and simplistic idea that *any* religious expression in the public schools is automatically suspect. It is further urged that many fundamental constitutional rights are being violated under this misapplication of the Establishment Clause, cheapening the value of the constitutional rights of these students for no higher reward than to keep empty an empty school room (not "classroom").

The decision of the Court of Appeals conflicts with the First and Fourteenth Amendments to the United States Constitution as well as recent decisions rendered by this Court. The issue is one of such magnitude and of such

great constitutional importance that it should be decided by this Court in favor of the students' free expression.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioners,

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AD HOC GROUP OF STATE EDUCATION OFFICIALS, SCHOOL ADMINISTRATORS, AND SCHOOL BOARD MEMBERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

May public school officials permit student-initiated religious groups to meet at a high school on the same basis as other student-initiated groups?

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INTEREST OF THE AMICI CURIAE

The *amici curiae* are individuals serving with state or local public school agencies in an official administrative, executive, or supervisory capacity. Each bears the direct or shared responsibility of applying and enforcing federal and state Constitutional and legal requirements in the administration of public schools. A more particular description of each individual *amicus curiae* is provided below. Except as otherwise noted, each *amici* appears

before this Court in his individual capacity and not as the representative of any state or local public school agency.

Amici do not lightly seek leave to appear before this Court. However, the decision below would require public school administrators to discriminate against students who wish to use public school facilities for student-initiated meetings considered to have religious content. Your *amici* would be forced into the role of applying and enforcing this discrimination.

Many of your *amici* serve in an official capacity for public secondary schools where student-initiated religious groups have been permitted to meet on the same basis as other student-initiated groups. Those *amici* have found such a policy to be fair, easily administered, and favorably accepted by students and the public. Based on our experience as school administrators, all of your *amici* believe such a non-discrimination policy to be conducive to a positive public school environment and an appreciation by students of their Constitutional freedoms. Properly administered, we foresee no undue danger that such a policy will create either the fact or appearance of an establishment, endorsement or sponsorship of religion by public schools.

Your *amici* are deeply concerned about the administrative legal dilemma created by the decision below. Many public school districts have faced legal action for ruling that student-initiated religious groups either could *or* could not meet at public schools on the same basis as the student-initiated groups. The decision below prohibiting school meetings by such religious groups further complicates matters for public school administrators by forcing them to rule in advance whether a proposed student-initiated meeting will be impermissibly religious and then to monitor ongoing student-initiated meetings to insure they do not become impermissibly religious. Threats of litigation would hang over these difficult ad-

ministrative decisions. In contrast, an impartial policy toward meetings of all student-initiated groups minimizes these administrative and legal concerns. We welcome such a nondiscriminatory policy.

Your *amici* are as follows:

Gary C. Newbill appears in his official capacity as Superintendent of the Vashon Island School District No. 402, Vashon, Washington. Superintendent Newbill has served as Assistant Superintendent (1982-84) and Director of Personnel (1979-82) for Issaquah School District No. 411, Issaquah, Washington; Adjunct Professor in education at the University of Washington (1977-78); General Counsel for the Northshore School District No. 417, Bothell, Washington; and a high school social studies teacher for the Shoreline Public Schools, Seattle, Washington. Superintendent Newbill holds a law degree from the University of Washington.

Charles Glenn is Director of the Bureau of Equal Educational Opportunity, Massachusetts Department of Education. Dr. Glenn holds a doctorate in educational administration from Harvard University and has taught classes there and at Boston University on civil rights issues in education. He has extensive experience in developing and implementing school desegregation plans as a consultant for several state agencies, the federal court, the Education Commission of the States, and the federal Department of Education.

Clifford W. Campbell is Superintendent of Quilcene School District No. 48, Quilcene, Washington. Dr. Campbell has served as Superintendent of Dixie School District, San Rafael, California (1969-78); a public school principal, vice principal, and teacher (1959-69); and a State Board member of the Washington Association of School Administrators. Dr. Campbell holds a doctorate in school administration from the University of Southern California.

Robert J. Sterrett is Principal of Greenway High School, Greendale Union High School District, Phoenix, Arizona. Mr. Sterrett has served as the Principal of Greenway High School for twelve years and a public school administrator for fifteen years.

Lawrence E. Neigel is President of the Board of Education for the San Bernardino City Unified School District, San Bernardino, California. Mr. Neigel has served in his present post for two years, preceded by two years as Vice President of the same Board, with a total of eight years as a Board member. San Bernardino City Unified School District serves over 30,000 students and maintains three high schools.

Helen Nelson is Director of Professional Personnel Services for the Boone-Winnebago Counties Regional Office of Education, Rockford, Illinois. Prior to assuming her current position, Ms. Nelson had 19 years experience as a public school principal.

Stan Scheer is Assistant Superintendent, Division of Administrative Services of the Wyoming State Department of Education. Dr. Scheer holds an Ed.D. from the University of Wyoming and has served as an Assistant Superintendent for public school districts in Eaton, Colorado and Douglas, Wyoming.

Gerald A. Rosander has served as San Diego County Superintendent since 1976. Mr. Rosander's office provides programs and services to forty-five public school districts and five community colleges in San Diego County. These programs enroll over a half million students. Prior to assuming his present position, Mr. Rosander served as a teacher and administrator for the Fresno Unified School District, Fresno, California.

Virgil Don Loftis is Superintendent of Hamilton County Schools, Chattanooga, Tennessee. Dr. Loftis holds

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STATEMENT OF THE CASE

Amici curiae adopt and incorporate by reference the statement of the case appearing in the brief filed by the petitioners Michael Bender, *et al.*

SUMMARY OF ARGUMENT

School officials can simply and fairly administer a policy of permitting meetings at public high schools by student-initiated religious groups on the same basis as meetings by other student-initiated groups. Such a policy allows school officials to teach by example the meaning of our

Constitutional freedoms. It also promotes public education by accommodating students' spiritual needs. Uniform time, place, and manner restrictions could be imposed on all student-initiated groups to insure secular school goals are advanced. Additional reasonable requirements could also be employed in the case of student-initiated religious meetings to dispel any misperception of school endorsement. In contrast, a discriminatory rule prohibiting student-initiated religious meetings invites continued legal and public controversy by forcing school officials to make difficult decisions about what is and is not religious.

ARGUMENT

I. Permitting Student-Initiated Religious Meetings at Public High Schools on the Same Basis as Other Student-Initiated Meetings Will Resolve a Serious Dilemma Confronting Public School Officials.

Public school officials are constrained to respect the Constitutional rights of students or else face legal action. *Tinker v. Des Moines School District*, 393 U.S. 503, 511 (1969) ("School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution."). The dual question for public school officials then is: (1) What Constitutional rights do their students possess? and (2) How must those rights be accommodated in light of the special characteristics of the public school environment? *Id.* at 506. A wrong answer or a close call in any particular situation can lead to costly litigation. In many areas (such as the political expression involved in *Tinker*) school officials face little risk of litigation if they lean on the side of an expansive interpretation of students' rights. This cushion has not existed for student-initiated religious expression, where the Establishment Clause and the Free Speech Clause of the Constitution

lie like Scylla and Charybdis threatening to devour school officials.

Lawsuits and threats of litigation have dogged school officials when deciding (either way) whether or not student-initiated religious groups can meet at public schools on the same basis as other student-initiated groups. Public school officials allowing such meetings have been sued by disgruntled individuals and organizations for violating the Establishment Clause in Lubbock, Texas; Little Axe, Oklahoma; and Clayton County, Georgia.[1] Public school officials denying access for such meetings have been sued by students for violating students' freedom of speech in Guilderland, New York; Houston, Texas; and in the present case from Williamsport, Pennsylvania.[2] Such lawsuits can be costly to the school district and disruptive of both the academic program and community support for the school. Though the federal Equal Access Act, 20 U.S.C.A. § 4071-74 (West), provides some definite guidance for school officials on this issue, a clear ruling from this Court stating that student-initiated religious groups have a Constitutional right to meet at public schools on the same basis as student-initiated non-religious groups is needed to resolve the dilemma confronting school officials. Such a ruling by this Court for public post-secondary schools in *Widmar v. Vincent*, 454 U.S. 263 (1981), effectively resolved a parallel legal problem for college and university officials.

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[1] *Lubbock Civil Liberties Union v. Lubbock Independent School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); *Bell v. Little Axe Independent School Dist. No. 70*, No. CIV-81-620-T (W.D. Okla. Mar. 14, 1983), *appeal docketed*, No. 83-1458, 83-1493 (10th Cir. 1983); and *Nartowicz v. Clayton County School Dist.*, 736 F.2d 646 (11th Cir. 1984).

[2] *Brandon v. Guilderland Bd. of Educ.*, 635 F.2d 971 (2nd Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) and *Amidei v. Spring Branch Independent School Dist.*, Civil No. H-84-4673 (S.D. Tex. Apr. 26, 1985).

II. Permitting Student-Initiated Religious Meetings at Public Schools on the Same Basis as Other Student-Initiated Meetings is a Viable, Workable Solution to the Dilemma Confronting School Officials.

As discussed below, a policy of permitting student-initiated religious groups to meet at public schools on the same basis as other student-initiated groups would allow school officials to deal simply and impartially with student demands for such meetings. In contrast, prohibiting meetings by such groups would further complicate the legal difficulties confronting school officials.

A. *Prohibiting Student-Initiated Religious Meetings Would Force School Officials to Rule in Advance on What Constitutes Impermissibly Religious Speech and Activities.*

A restrictive policy prohibiting meetings at public schools by student-initiated religious groups thrusts school officials into a continuing role of deciding which groups are religious and which are not. Is a church or synagogue-related student-initiated group inevitably religious even though the group declares that it wishes only to discuss social issues? Is the local chapter of the nationwide student "Hi-Y" group imputedly religious because it is associated with the Young Men's Christian Association? Does an otherwise purely secular student group become religious because its student leaders open meetings with prayer or observe a religious holiday? Is a student yoga, astrology, or "Dungeons and Dragons" club religious due to the spiritualistic aspects of its activity?

These questions and countless others like them confront school officials who are forced to exclude student-initiated religious groups from the benefits conferred on other student-initiated groups. The dilemma is made all the more difficult because it involves making a decision *in advance* on the content of speech and activities at

future meetings. School officials would face the continuing threat of litigation for their decisions. Students from *ex*cluded groups could charge that their group is *not* impermissibly religious. Individuals and organizations opposed to *in*cluded groups could allege that those groups *are* indeed impermissibly religious. The current dilemma would continue, albeit in the different guise of which groups are and are not impermissibly religious.

B. *Prohibiting Student-Initiated Religious Meetings Would Force School Officials to Monitor Speech and Activities at Student Meetings.*

A restrictive policy prohibiting religious meetings at public schools by student-initiated groups requires school officials not only to make decisions in advance about the content of meetings, but also to monitor speech and activities at meetings to insure that approved meetings do not become impermissibly religious. It is one thing to supervise activities by teachers and other individuals at official public school activities to insure those school activities remain within school objectives and do not become religious in violation of the Establishment Clause. *See, e.g., McCollum v. Board of Education*, 333 U.S. 203 (1948). It is quite another thing to monitor conversations by students at voluntary, student-initiated, non-school-sponsored activities where official school personnel may not even be present.

If arguably religious speech or activities were alleged to occur at meetings of a student-initiated group, school officials would be forced to decide whether such speech or activity had occurred and was impermissibly religious, and whether the group could continue to meet. Again, school officials would face the threat of litigation whatever their decision. Such tough decisions for public school officials would be avoided by a policy of allowing all student-initiated groups the same access to school facilities. Just such relief was provided for public post-secondary school officials by the *Widmar* decision.

C. *Permitting Student-Initiated Religious Meetings on the Same Basis as Other Student-Initiated Meetings Gives School Officials the Discretion Necessary to Maintain Order and Discipline.*

A permissive policy allowing student-initiated religious groups the same access to public school facilities as other student-initiated groups leaves school officials with ample authority to preserve an academic environment and to control disruptive activities. The key to this control is that religious and non-religious groups would be treated impartially. Any risk of disruption from non-school persons attending student meetings could be dealt with by uniform, content-neutral restrictions on the character or frequency of their attendance. Uniform, content-neutral restrictions could also be imposed on all student groups requiring parental consent for participation. School officials would be free to shape such content-neutral restrictions to the administrative needs of their school. The threat of litigation would be minimized because any restriction would be based on objective, content-neutral standards *wholly* independent of Constitutionally suspect considerations tending either to restrict free speech or to promote religious establishment. Such content-neutral "time, place and manner" restrictions on Constitutionally protected speech were authorized by this Court in *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941), and applied to the public school setting by *Tinker*, 393 U.S. at 513.

A permissive policy allows school officials to treat all student-initiated groups impartially. A school official could always prohibit all meetings by student-initiated groups where, on balance, it was determined that such groups do not further secular school objectives. Uniform time, place, and manner restrictions could be imposed on all groups to insure secular school goals are advanced. Such content-neutral decisionmaking (which avoids decisions over what is and is not impermissibly religious) represents the proper role for public school officials.

D. *School Officials Can Apply Clear, Court-Imposed Limits on Student-Initiated Religious Meetings.*

Even if this Court enunciated certain limiting principles on student-initiated religious meetings at public schools, such a policy would be preferable to a ban on such meetings altogether. As discussed above, such a blanket ban would force school officials to decide what is and is not impermissibly religious and then monitor ongoing activities to insure that sanctioned groups do not cross the line—with the threat of litigation hanging over each decision. Clear reasonable limitations on the student-initiated religious groups need not create the same threat of litigation.

One such limitation could restrict the nature of participation by school personnel in student-initiated religious meetings if this Court concluded that some forms of participation might "confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274. Reflecting this concern, the Equal Access Act allows public school officials to choose to limit participation of school personnel at student-initiated religious meetings even where such limits do not apply to other student-initiated meetings. 20 U.S.C.A. § 4071(c)(3) (West); and 130 *Cong. Rec.* S8342-43 (daily ed. June 27, 1984) (remarks of Sens. Hatfield and Gorton). Although such a restriction requires school officials to decide which student-initiated groups are religious if teacher participation is desired for meetings of non-religious groups, public school officials can somewhat freely limit teacher participation for questionable groups without a realistic threat of litigation. *See National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270, 1274 (1984), *aff'd*, 53 USLW 4408 (1985) ("We recognize that a state has interests in regulating the speech of teachers that differ from its interests in regulating the speech of the general citizenry."). The Court could declare principles imposing

Constitutional restrictions on participation by school personnel like those suggested by Congress in the Equal Access Act.

The Equal Access Act, moreover, applies only to secondary schools and a similar qualification could be imposed by this Court as a Constitutional requirement here. 20 U.S.C.A. § 4071(a) (West). Federal courts sometimes apply Constitutional rights differently for secondary students than for elementary students. *E.g., Grove v. Mead School District No. 354*, 753 F.2d 1528, 1540 (9th Cir. 1985) (differentiating between the sophistication of elementary and secondary school students as a factor in applying Establishment Clause protections). Justice Stewart of this Court has observed that young age may be a factor in determining the extent of an individual's Constitutional rights. *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).[3] As a factual matter, the present case solely involves secondary school students. Recognizing here that the Constitutional rights announced in *Widmar* for public post-secondary school students extend to public secondary school students (rather than to all public school students) would still provide an enforceable bright-line standard resolving most of the current dilemma confronting public school officials. Student-initiated groups rarely exist at the elementary school level. Further, the above-identified litigation arising from decisions to grant or to deny access to student initiated religious groups has focused on secondary school students.[4]

Thus, if this Court determines that the Constitution requires certain clear limits on student-initiated religious groups at public schools (such as a restriction on teacher

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[3] *But see Tinker* where this Court apparently interpreted the Constitutional protections for free expression as applying equally for public school students "from kindergarten through high school." 393 U.S. at 516 (Black, J. dissenting).

[4] This litigation is cited in footnotes 1 and 2, *supra*.

participation or application only to secondary schools) school officials could, as a practical matter, readily impose such limitations while still avoiding an unreasonable risk of litigation. Indeed, distinctions either involving supervised school personnel or based on the type of school are easily administered.

III. School Officials Can Teach the Proper Balance Between Freedom of Speech and Establishment of Religion By Allowing Student-Initiated Religious Groups to Meet on the Same Basis as Other Groups.

A policy of granting all student-initiated groups the same access to school facilities provides a vehicle for public school officials to teach *by word and deed* the proper balance between the various First Amendment rights. Students testifying before Congressional committees in favor of the Equal Access Act expressed their confusion over why religious speech was singled out for restriction at meetings of student-initiated groups. *See, e.g., Equal Access: A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary*, 98th Cong. 37-38 (1983) (statement of Bonnie Bailey); and *Religious Speech Protection Act: Hearings on H.R. 4996 Before the Subcomm. on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor*, 98th Cong. 52-54 (1984) (statement of Lisa Bender Parker).

School officials are capable of teaching the proper balance between allowing the freedom of speech and preventing the establishment of religion by permitting student-initiated groups to meet at public schools for religious expression on the same basis as for other expression while, at the time time, not sponsoring that religious expression. Students could then fully exercise their freedom of speech whenever their school creates a forum or opportunity for student-initiated groups. The imperative for such an exemplary recognition of students' Constitutional rights by public schools officials was noted

by this Court stating, "That they [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia v. Barnette*, 319 U.S. 624 , 637 (1943).

IV. Granting Student-Initiated Religious Groups Access to Public School Facilities Promotes Public Education.

A Constitutional freedom allowing student-initiated religious groups the same access to school facilities as other student-initiated groups permits public schools to accommodate the needs of some students for personal religious intercommunication during the school day. See *Tinker*, 393 U.S. at 312 ("The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students.") Without such accommodation, the families of some of those students might have their children attend private schools or be schooled at home. This, in turn, potentially reduces the constituency of and support for public education. By allowing public schools to accommodate legitimate student needs to the full extent Constitutionally permissible, permitting student-initiated religious group meetings at public schools promotes public education.

CONCLUSION

For the reasons stated above, this Court should reverse the decision of the Court of Appeals below and establish a Constitutional policy permitting meetings by student-initiated religious groups at public high schools on the same basis as meetings by other student-initiated groups.

Respectfully submitted,

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No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights is a non-profit voluntary association, national in membership, organized to promote good will and harmonious relations in the community, to combat all forms of religious prejudice and discrimination and to defend the human rights and sanctity of each human life.

The Catholic League possesses a firm commitment to the preservation of all the principles embodied in the First Amendment to the U.S. Constitution. As a result of the dangers which the Catholic League believes an adverse judgment in this case would pose to these fundamental rights, the League has sought to file this brief amicus curiae in support of the petitioners in this action.

STATEMENT OF THE CASE AND ISSUES PRESENTED

Amicus curiae, the Catholic League for Religious and Civil Rights, adopts and incorporates by reference both the statement of the case and of issues presented which appear in the brief of the petitioners.

SUMMARY OF ARGUMENT

Many of the difficulties in the decision of the court of appeals in this matter stem from its reliance upon confusing legal precedent and, most particularly, the Second Circuit's ruling in *Brandon v. Board of Education*, 635 F.2d 971 (2nd Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). The *Brandon* ruling is irretrievably flawed in two significant respects. First, the *Brandon* court misinterpreted the scope and extent of the free speech rights of high school students by failing to find the existence of a limited public forum. Second, the court misinterpreted the distinction between accommodation and advancement of religion in ruling that permitting a group of high school students to voluntarily gather prior to the school day's commencement to offer a prayer violated the Establishment Clause of the First Amendment. Given the confusion *Brandon* has subsequently imposed on the field of equal access, particularly evidenced by the case currently before this Court, the reasoning underlying the *Brandon* decision should be repudiated and the ruling of the court of appeals should be reversed.

ARGUMENT

THE SECOND CIRCUIT'S RULING IN *BRANDON* DIRECTLY CONFLICTS WITH THIS COURT'S INTERPRETATION OF THE FREE SPEECH AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The United States Court of Appeals for the Third Circuit, in issuing its recent ruling in *Bender v. Williamsport Area School District*, 741 F.2d 538 (3rd Cir. 1984), emphasized, "We are therefore left with no definitive guidance from the Court as to

the proper direction to take in this unique circumstance." *Id.* at 557. The court accurately assessed the desperate need of the lower courts in this area for guidance from this Court. The need for guidance however, concerns not the proper balancing of the Free Speech and Establishment Clause interests of which the Third Circuit spoke, but concerns rather the proper method of analyzing alleged Establishment Clause violations in equal access cases.

The numerous conflicting rulings in these areas illustrate the vital need for such a determination. *Compare Nartowicz v. Clayton County School District,* 736 F.2d 646 (11th Cir. 1984), *with Lubbock Civil Liberties Union v. Lubbock Independent School District,* 669 F.2d 1038, *reh'g denied,* 680 F.2d 424 (5th Cir. 1982), *cert. denied,* 459 U.S. 1155 (1983); *Johnson v. Huntington Beach Union High School District,* 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied,* 437 U.S. 887 (1977). Much of the confusion which presently pervades this area was initiated by the ruling of the United States Court of Appeals for the Second Circuit, in *Brandon v. Board of Education,* 635 F.2d 971 (2nd Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981). Indeed, the *Brandon* ruling has extensively affected most of the subsequent cases in this area. Though not controlling precedent outside of its circuit, its impact in this area has been substantial. In fact, it was often cited by the Third Circuit in *Bender* as support for that court's ultimate Establishment Clause ruling. Given the constitutional infirmities present in the *Brandon* ruling, amicus curiae respectfully requests that the Court now overrule it.

In *Brandon,* a group of high school students, organized as "Students for Voluntary Prayer," requested permission to meet in a classroom for group prayer immediately before the school day commenced. The group noted that it was only seeking the same access to school facilities which other student groups already enjoyed, and that its activities would be both voluntary and not in conflict with other school functions. When both the principal and the school district denied their request, the students brought suit for declaratory, injunctive and monetary relief. They alleged that the denial of access violated their first amendment rights.

The District Court granted the school district's motion for summary judgment. On appeal, the Second Circuit affirmed that

decision, holding that the refusal did not violate the students' rights to free speech, freedom to exercise their religion, freedom of association, or equal protection. In addition the court concluded that such prayer meetings were prohibited by the Establishment Clause. The students' certiorari petition to this Court was subsequently denied. *Brandon v. Board of Education*, 454 U.S. 1123 (1981).

A. *Brandon* Misinterprets The Free Speech Rights Of High School Students.

Brandon's ruling on the Establishment Clause issue there presented has had far greater persuasive impact than its Free Speech determination. In fact, this Court's ruling in *Widmar v. Vincent*, 454 U.S. 263 (1981), only a week prior to the denial of certiorari in *Brandon*, served implicitly to reverse the *Brandon* court's determination on the Free Speech issue. Nevertheless, this Court should now clarify the law by explicitly acknowledging and overruling, in light of *Widmar*, the errors the Second Circuit made regarding free speech rights.

In *Widmar*, the Court upheld the right of students at the University of Missouri-Kansas City to gain access to university-owned facilities in order to meet for prayer, Bible study and worship. This Court held that the university's content-based restriction on the use of its facilities infringed the students' right to free speech. Moreover, no compelling state interest justified this infringement. Since the free speech rights upheld in *Widmar* also apply in the high school context, the Second Circuit's constitutional interpretation in *Brandon* cannot stand.

It is true that local school boards are afforded broad discretion in the management of their schools' affairs. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). However, while " 'Boards of Education . . . have . . . important, delicate, and highly discretionary functions . . . they may not [exceed] . . . the limits of the Bill of Rights.' " *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (quoting *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)). As the Court emphasized in *Tinker v. Des Moines Independent Com-*

munity School District, 393 U.S. 503 (1969), students do not "shed their rights to freedom of speech or expression at the school house gate. . . . They are possessed of fundamental rights which the state must respect . . . [and] . . . in the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 506, 511. The court in *Brandon*, therefore, incorrectly interpreted the extent of students' First Amendment right to free speech.

1. Religious speech receives the same level of constitutional protection as any other form of speech.

First, when the court in *Brandon* analyzed the students' free speech claim, it erroneously stated that religious speech, including prayer, was not to be accorded the same constitutional protection as other types of speech. *Brandon*, 635 F.2d at 980. Yet, such a distinction was specifically rejected in *Widmar*. This Court noted that the attempt to relegate religious speech to secondary status lacked any "intelligible content." *Widmar*, 454 U.S. at 269 n.6.

2. By opening its facilities to use by all student groups, the high school in *Brandon* created a limited public forum.

Second, and further developing this view that religious speech possesses diminished constitutional value, the *Brandon* court concluded that a high school was not a public forum where religious views could be aired.

It is true that a high school does not meet the traditional test for public forums. "The primary factor in determining whether property . . . is a public forum is how the locale is used." *International Society for Krishna Consciousness v. New Jersey Sports and Exposition Authority*, 691 F.2d 155, 160 (3rd Cir. 1982). Thus, places traditionally or normally reserved for public assembly, debate, and so forth, are considered public forums. *See, e.g., Hague v. C.I.O.*, 307 U.S. 496 (1939). Since high schools are not normally dedicated to such activities, they would not meet the traditional test for a public forum.

However, public property can be classified as a "limited" public forum. A limited public forum arises when the state decides to allow the property to be used for expressive activity. Thus, in *Widmar,* for example, this Court stated that "through its policy of accommodating . . . meetings, the University . . . created a forum generally open for use by student groups." 454 U.S. at 267. The Court acknowledged that the government would be permitted to impose restrictions on the use of the limited public forum so long as they were necessitated by the purpose for which the forum was created. *Id.* at 267. Thus, with respect to limited public forums created in a school setting, the government could permissibly restrict access to the forum from individuals "outside" the school.

Yet, the Court emphatically warned that:

> [I]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must . . . satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Id. at 269-70. *See also Carey v. Brown,* 447 U.S. 455, 461, 464-65 (1980). Further, the Court noted that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Id.* at 267-68.

By opening its facilities to use by all student groups, the school in *Brandon* created a similar, "limited" public forum. To read *Widmar* narrowly for the proposition that only universities, and not high schools, may become limited public forums, is to completely misconceive this doctrine. On the contrary, this Court noted in *Tinker* that a public high school "is peculiarly the 'marketplace of ideas,' " *Tinker,* 393 U.S. at 512, though the high school setting does possess "special characteristics" which have to be taken into account. *Id.* at 506. Thus, given the proper circumstances, a high school may become a limited public forum. *Ac-*

cord International Society for Krishna Consciousness v. New Jersey Sports and Exposition Authority, 691 F.2d 155, 160 (3rd Cir. 1982) ("Since the exchange of ideas is an essential part of the educational process . . . a public high school is probably a limited forum").

In its ruling in *Bender v. Williamsport Area School District*, 563 F. Supp. 697 (M.D. Pa. 1983), the district court enumerated those "special circumstances" which would prevent a high school from qualifying as a limited public forum. *Bender*, 563 F. Supp. at 706-07 (restriction warranted to ensure order, to observe time or space limitations, or to maintain the forum as purely an extension of the school's curriculum). However, none of these were evident in *Brandon*. The school district at no time claimed that a voluntary prayer meeting prior to commencement of the school day would result in order or discipline problems. Nor did the school district or principal ever contend that there were an excessive number of requests from other student groups for such meetings. The record is likewise devoid of any claim that other groups could only meet as an extension of the school's curriculum. Consequently, since none of these special circumstances existed, and since other groups covering a wide range of interests were permitted to meet prior to the school day, it is clear that the school had created a limited public forum for its students' use. The *Brandon* court's failure so to rule therefore clearly contravenes prior rulings of the Supreme Court on this question. Thus, this Court should now rectify this error by overruling the *Brandon* court's holding on this issue.

Finally, it should be noted that any constitutional content-based restriction on the use of a limited public forum must be narrowly drawn and necessary to serve a compelling state interest. *Widmar*, 454 U.S. at 270. The record in *Brandon* is silent on the existence of any such compelling state interest. Nor does the factual scenario present in *Brandon* even suggest the existence of such an interest. Accordingly, no justification can be found for the court's ultimate holding respecting free speech in the *Brandon* case.

B. Prohibiting Students From Voluntarily Gathering In School-Owned Facilities Prior To Commencement Of The School Day To Engage In Group Prayer Traverses The Historical Goals Of Neutrality And Accommodation Rooted Within The Establishment Clause.

The Third Circuit's ruling in *Bender* encountered many of the same problems as previous lower court decisions which attempted to resolve Establishment Clause issues in light of the Second Circuit's ruling in *Brandon*. The court in *Bender* arrived at the issue in a different manner than the *Brandon* court. *Bender* properly avoided the clearly flawed free speech analysis of the *Brandon* decision and concluded that the denial of access for the student group (Petros) would infringe upon the students' constitutional right of free speech and could only be justified by the existence of a compelling state interest, *Bender*, 741 F.2d at 550, such as the avoidance of an Establishment Clause violation. The *Brandon* court, on the other hand, only addressed the Establishment Clause issue as a result of a potential Free Exercise contention (which the court subsequently rejected). However, though reaching the issue through different avenues, both of these judicial bodies used similar reasoning to arrive at an identical conclusion—that permitting these school groups to meet would violate the Establishment Clause and that such a violation outweighed the students' Free Exercise (*Brandon*) or Free Speech (*Bender*) rights. Regrettably, both of these rulings are in complete disharmony with the historical purpose behind the Establishment Clause.

1. The *Brandon* court properly concluded that a policy of permitting students to gather in school-owned facilities possesses a secular purpose.

A tripartite test exists for Establishment Clause adjudication, whether it be merely a guideline, *Lynch v. Donnelly*, 104 S. Ct. 1355, 1361-1362 (1984) or necessary measure of constitutionality, *id.* at 1372 n.2 (Brennan, J., dissenting): "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster an excessive gove.n-

ment entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). If any one of the prongs of the *Lemon* test is not met, then the policy may be held to violate the Establishment Clause.

The *Brandon* court did correctly apply the first prong of this tripartite analysis. The judge noted that this prong requires an inquiry as to whether the policy which permitted the activity to take place had a secular purpose. *Brandon*, 635 F.2d at 978. The court had no difficulty concluding that an equal access policy for all student groups reflected a secular purpose. The mere fact that a religious group wished to take advantage of this policy did not give rise to an impermissible nonsecular goal. *Brandon*, 635 F.2d at 978. *See also Widmar*, 454 U.S. at 271-72 n.10. Accordingly, the court held that the equal access policy possessed the requisite secular legislative purpose. *Brandon*, 635 F.2d at 978.

2. The *Brandon* court's determination that the primary effect of a content-neutral equal access policy is the advancement of religion reflects an inaccurate and inconsistent view of the judicial treatment of high school students.

The *Brandon* court stated that because an impressionable student might believe the state was sponsoring a particular religious creed, an equal access policy was "too dangerous to permit." *Brandon*, 635 F.2d at 978. In reaching this conclusion, the *Brandon* court is in complete disharmony with the reasoning of this Court in *Widmar*. *Widmar* stated that the effect of according religious groups equal access to a limited public forum would be a constitutionally justified accommodation of religion, and not an impermissible advancement of such beliefs. *Widmar*, 454 U.S. at 273. Two factors assisted the Court in arriving at this conclusion:

> First, an open forum . . . does not confer any imprimatur of State approval on religious sects or practices[;] . . . such a policy "would no more commit the University . . . to religious goals" than it is "now committed to the goals of [other groups]" eligible to use its facilities.
>
> Second, the forum is available to a broad class of nonreligious as well as religious speakers; . . . [t]he provision of

> benefits to so broad a spectrum is an important index of secular effect.

Id. at 274 (citations omitted).

Both of these factors were present in *Brandon*. First, allowing a student group to gather on state-owned facilities no more conferred an imprimatur of state approval of religion than would allowing the newspaper staff to meet in the same facilities represent official approval of that which was printed in the school's student newspaper. Second, the limited public forum was available to a broad range of nonreligious school organizations. (While the number of such groups was significantly less than the nearly 100 groups which existed in *Widmar*, when one takes into account the enrollment difference between the two schools, the two become proportionally similar.)

There is a clear distinction between advancement and accommodation, a distinction which escaped the judges in *Brandon*. Regrettably, lacking the guidance of *Widmar*, the court in *Brandon* mistakenly relied on the precedents of *School District v. Schempp*, 374 U.S. 203 (1963), and *Engel v. Vitale*, 370 U.S. 421 (1962). Yet, the obvious factual differences which exist between these cases and the scenario present in *Brandon* graphically display the inappropriateness of their use. Failing to grasp these distinctions, the *Brandon* court came to the inaccurate conclusion that advancement results not only from compulsory action, as was the case in *Schempp* and *Engel*—where objecting students had no choice but to refrain conspicuously from participating in official religious activity—but also from purely voluntary action undertaken completely apart from the other students, which was the situation facing the *Brandon* court. Such a broad rule was certainly not intended by this Court when it proscribed conduct which had the "*primary*" effect of "*advancing*" religion.

Moreover, the *Brandon* court's incomprehensible assessment of the maturity level and intellectual capacity of these high school students further evidences that court's inability to recognize the distinction which exists between advancement and accommodation. While *Widmar's* statement, that college-aged students were in a position to appreciate that an equal access policy did not

imply state approval of the participating groups' activities, does not literally encompass the high school setting, at no time did the *Widmar* Court determine that the requisite level of maturity and intellect was restricted to college students. Indeed, such a restriction defies common knowledge and common sense.

Undeniably, high school students are not yet adults. Yet, this fact alone does not necessitate a determination that they are helpless individuals, dependent totally upon others to decide for them the important questions which face society. Moreover, judicial treatment of high school students defies such a determination. The author of *Brandon*, Judge Kaufman, certainly could not be of this impression. In deciding that tenth grade students possessed sufficient maturity such that a teacher's refusal to lead a flag salute would not have a destructive effect on them, Judge Kaufman emphasized:

> We do well to note that her pupils were not fresh out of their cradles . . . [They were] students ranging in ages between 14 and 16 years . . . [who] at this stage of development are approaching an age when they form their own judgments. *They readily perceive the existence of conflicts in the world around them*[;] . . . [n]or is this knowledge to be dreaded. As we said in *James*: *"Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue."*

Russo v. Central School District No. 1, 469 F.2d 623, 633 (2nd Cir. 1972) (citation omitted) (emphasis added).

Other jurisdictions have also described high school students as "surprisingly sophisticated, intelligent, and discerning . . . far from easy prey for even the most forcefully expressed, cogent, and persuasive words." *Wilson v. Chancellor*, 418 F. Supp. 1358, 1368 (D. Or. 1976). And in *James v. Board of Education*, 461 F.2d 566 (2nd Cir. 1971), it was emphasized that "the court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the latter grades of secondary schools[;] . . . [h]igh school students . . . are at an age approaching both adulthood and franchise." *James*, 461 F.2d at 574. Additionally, empirical evidence supports the judicial no-

tice of the high level of intellectual maturity possessed by high school students. *See* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-509 (1983).

It is precisely because of this recognized level of maturity present in today's high school student that a federal district court decided that high school students could handle reading information about contraception and abortion in their school newspaper. *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 504 (2nd Cir. 1975). In fact, this very Court has even concluded that high school students are viewed with sufficient intellectual capacity to be permitted to wear armbands in protest against the Vietnam War, *see Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and to refuse to salute or pledge allegiance to the flag, *see West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). It is inherently inconsistent to hold that high school students are mature enough to handle the political, social and moral issues facing society today, but lack sufficient insight to distinguish a government-run event from a purely student-initiated activity.

Moreover, if high school students possess such a high degree of impressionability, then logic would dictate that these same individuals will interpret the school's content-based restriction in an otherwise open forum as a manifestation of government hostility toward religion. How can "impressionable" students be unable to determine whether the state is implying, tacitly or otherwise, an endorsement of religion, but nevertheless remain *mature* enough to realize that the state's policy is not rooted in hostility towards religion? The Establishment Clause prohibits both government endorsement and disapproval of religion. *Lynch*, 104 S. Ct. at 1368 (O'Connor, J., concurring); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980); *Lemon*, 403 U.S. at 612. The State *must* be neutral in this area. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 782 (1973). As was properly pointed out by the dissent in *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 680 F.2d 424 (5th Cir. 1982): "We should not forget, however, that the young student may also be given the impression that our government and the court and the schools are

hostile to all religious beliefs and practice. I would consider that a very great wrong to the children, to the Constitution, and the nation." *Id.* at 426 (Reavley, J., dissenting) (emphasis added). *See also Bender,* 741 F.2d at 565 (Adams, J., dissenting). Indeed such a hostile impression may already have been implanted in the minds of some of our youth. *See Hearings on S. 425, S. 815 & S. 1059 Before the Senate Committee on the Judiciary,* 98th Cong., 1st Sess. (1983) (statement of Bonnie Bailey, student of Monterey High School, Lubbock, Texas) ("The impression of many students is that the school administration or the school board or the courts, or all of them, are hostile toward religion[;] . . . [and that the government] is against religion").

Yet the court in *Brandon* was deafeningly silent on this point. This silence clearly reflects the court's inability to reconcile the inherent inconsistency between an overscrupulous avoidance of religion and the maintenance of neutrality toward religion. Such inconsistency certainly was never envisioned by our constitutional forefathers when they drafted and enacted the cherished rights which the First Amendment comprises. Indeed, the erroneous analysis which the court in *Brandon* applied to this area precluded the court from assessing potential alternatives which might alleviate their "imprimatur" fears. For example, if the court had been committed to a *neutral* policy in this area, it could have ordered that a disclaimer be posted on the door of the room in which the student group was meeting. Such a sign would provide notice to any student present that the State neither supported nor opposed the views of the religious group which was meeting. The Establishment Clause recognizes "room for play in the joints productive of a benevolent neutrality . . . permit[ting] religious exercise to exist without interference," *Walz v. Tax Commission,* 397 U.S. 664, 669 (1970).

3. The *Brandon* court's finding of an excessive entanglement between religion and government is incompatible with prior and subsequent Supreme Court precedent.

Brandon's ruling that permitting a religious student group to meet would foster an excessive entanglement between religion

and the State also lacks precedential support. The court concluded that since school officials would be required to supervise the meetings in order to ensure that they were voluntary and orderly, this would yield an excessive entanglement and was therefore constitutionally impermissible. *Brandon,* 635 F.2d at 979.

This conclusion is improper. Such minimal supervision would involve no more of an "entanglement" than that which occurs when the State provides police or fire protection to a church. This Court has determined that such protections do not violate the Establishment Clause. *See Roemer v. Board of Public Works,* 426 U.S. 736, 747 (1976); *Everson v. Board of Education,* 330 U.S. 1, 17 (1947). Nor have lower courts felt that providing policemen for a religious rally held in a public park or the celebration of a Mass at a mall result in an excessive entanglement. *See O'Hair v. Andrus,* 613 F.2d 931 (D.C. Cir. 1979).

Moreover, in *Widmar* this Court stated that it would be more of an entanglement to require school officials to monitor the content of each group's meetings (in order to enforce the exclusion of religious speech) than it would be to passively permit such speech. The Court stated:

> [T]he University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." . . . Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove *"an impossible task in an age where many and various beliefs meet the constitutional definition of religion."* . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U.S. at 271 n.11 (citations omitted) (emphasis added).

Thus, it is clear that *Brandon's* remarks in this area are completely incompatible with the jurisprudence of excessive entanglement.

This review of the three prongs of the tripartite Establishment Clause test set forth by this Court demonstrates the absence of

any violation in the *Brandon* fact pattern. Accordingly, the alleged violation of the Establishment Clause in *Brandon* clearly could not have provided the necessary compelling state interest required to justify the content-based restriction on the students' rights to free speech. Since the students' free speech rights were restricted, and since the school district offered no other constitutionally acceptable justification for this restriction of rights, the *Brandon* conclusion is irretrievably flawed, directly contradicts the First Amendment to the U.S. Constitution, and requires disapproval.

CONCLUSION

When inconsistency and misinterpretation pervade an area of constitutional law, this Court fulfills its function most nobly by taking the measures necessary to ensure the citizenry's continued enjoyment of their fundamental freedoms. The particular area presently before this Court has been fraught with confusion since the Second Circuit issued its ruling in *Brandon v. Board of Education*. Often this confusion has resulted in the deprivation of the fundamental rights of those to whom we eagerly look for tomorrow's leadership: our high school youth. This confusion has recently been compounded with the passage in Congress of The Equal Access Act, 98 Stat. 98-1302 (1984). Despite the clear constitutionality of that Act, many believe it to be unconstitutional and refuse to adhere to its teachings. *See* Appendix To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit In The Case Of *Bender v. Williamsport*, Appendix D, letter of October 10, 1984 from Nathan Stuart, Esq. to Gerald Seevers, Esq., p. 111a. In so doing, these individuals continue to transgress the rights of a substantial portion of our populace. It is essential that this Court take the necessary measures to vouchsafe the free speech rights of our high school students. Such measures entail the disapproval of the Second Circuit's holding in *Brandon* and reversal of the Third Circuit's holding in *Bender*, so indebted to the flawed ruling of *Brandon*. It is only through such a ruling that the importance which all

speech, including religious speech, carries in our republican society will be clearly established for all to see, hear and respect.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1984

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Petitioner

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

BRIEF OF THE INTER-VARSITY CHRISTIAN FELLOWSHIP OF THE U.S.A. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a policy denying equal access to secondary students which in fact also discriminates against post-secondary students should be allowed to stand.

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INTEREST OF THE AMICUS CURIAE

Inter-Varsity Christian Fellowship of the U.S.A., is a non-profit organization, incorporated under the laws of the State of Illinois in 1941. It began its existence on a university campus in a situation parallel to the fact pattern before the Court: students voluntarily meeting for Bible study, prayer and discussions concerning Christian faith. Today Inter-Varsity Christian Fellowship encompasses some 900 autonomous, indigenous campus groups ("chapters") in the nation's tertiary educational institutions: universities, colleges, technical institutes and schools of nursing. In its 44 years in the United States, the national organization has neither directed nor controlled the campus groups, but rather makes available resources, training and inter-collegiate activities to

those who desire it. Inter-Varsity Christian Fellowship encourages students to pursue truth and knowledge, to develop intellectually, spiritually, socially and personally, and to pursue vocations that will benefit society.

While many of the Inter-Varsity campus groups are found in "traditional" universities and colleges, some have developed or attempted to develop in public community colleges and vocational institutes which share a common governing board with local secondary schools. Inconsistent interpretations of this Court's decisions prohibiting state-mandated prayer in the public secondary schools not infrequently have an adverse impact on student-initiated, student-led, voluntary prayer or religious expression in post-secondary education at community colleges and technical institutes. In each of these instances, the post-secondary school is encompassed in the same school district and shares a common governing board with the local high school.

Similar to high school students, these students are commuters. In both types of school, students who wish to join with interested peers for a common purpose, will need to do so at a time and place convenient for most. The logical—often the only—solution is during the "academic" day and in school facilities.

Yet not infrequently local school districts deny these students permission to meet. After exhausting administrative routes, students have had to seek legal counsel to gain the rights they should have been freely given under this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981).

The difficulty is widespread. Reports of discrimination in post-secondary schools have come to the attention of Inter-Varsity Christian Fellowship from, *inter alia*, California, Iowa, Minnesota, Nevada, Oklahoma, and New York.

Inter-Varsity Christian Fellowship is concerned that the rights guaranteed by the Constitution are being denied to college students, as well as high school students, since they share a common school district and governing board with secondary school students. The confusion in the lower court decisions have led many governing boards having jurisdiction in common over both secondary and post-secondary schools in a given district to deny students rights at all levels.

The letter from the parties consenting to the filing of this brief are submitted herewith to the Clerk, pursuant to Rule 36.2.

STATEMENT

Amicus Curiae adopt and incorporate by reference the Statement of the Case appearing in the Brief filed by Petitioner Michael Bender *et al.*

SUMMARY OF ARGUMENT

Amicus submits this brief for the purpose of demonstrating that where secondary and post-secondary educational institutions are governed by a common board, the administrative authorities tend to look to the rule of law considered applicable to the secondary level. Such a policy has the effect of unfairly discriminating against the post-secondary students who desire to assemble for religious purposes and whose right to do so is guaranteed by the Constitution as interpreted by this Court in *Widmar v. Vincent, supra.* The harsh result of the lower court's decision, which denies a valuable right of speech, based solely on its religious content, to secondary and post-secondary students is reached only by ignoring standards set out by this Court in previous First Amendment cases.

ARGUMENT

I. A Policy or Regulation that Results in Unlawful Content-Based Discrimination is Constitutionally Infirm.

A. *The Effect of the Lower Court's Decision Will Perpetuate Content-Based Speech Discrimination Against Students in Some Locally Governed Post-Secondary Schools.*

In Constitutional law, unfair treatment or denial of normal privileges to persons because of their race, age, nationality or religion is a form of discrimination. *Black's Law Dictionary* 420 (5th Ed. 1979). Discrimination need not be intentional; a discriminatory result of a facially neutral practice is sufficient to establish a showing of discrimination. *Rich v. Martin Marietta Corp.*, 467 F. Supp. 587, 608 (Colo. 1979).

The effect of the lower court's decision is to prohibit *secondary* students from assembling voluntarily for the purpose of prayer and Bible study. Arguments are advanced that secondary students are less mature and more impressionable than post-secondary students, and therefore "less able to appreciate the fact that permission for Petros to meet would be granted out of neutrality toward religion and not advancement." *Bender v. Williamsport Area School District*, 741 F. 2d at 552. The lower court followed the reasoning of *Brandon v. Board of Education of Guilderland Cent. Sch.*, 635 F. 2d 971, 978 (2nd Cir. 1980): if the state gives even the "mere appearance" of secular involvement in religious activities, an impressionable student might consider this the state's endorsement or imprimatur.

Where secondary and post-secondary educational institutions share a common governing board, it has been observed that, not infrequently, no age distinction is made in applying policies restricting freedom of religious expression. Five examples illustrate the nature and ex-

tent of the discriminatory impact which results when local school districts apply the same policies to secondary and tertiary students.

Approximately 6,000 full-time students between the ages of 18 and 70 attend the Diablo Valley Community College in California; another 10,000 to 12,000 attend one or more classes. About thirty students participate in the Inter-Varsity Christian Fellowship chapter, one of ten student clubs on campus. The Inter-Varsity group may meet on campus, but not openly for prayer; according to student leader Bill Stephens, last fall the Dean informed the group's leaders that if they were found praying, they would be "kicked off campus". Furthermore, using the argument that the school is publicly funded, school authorities informed the group that it is impermissible to advertise a "prayer meeting;" a "personal concern meeting" is permissible, and a "meditation retreat" has been advertised. Article IX, Sec. 8 of the California Constitution is cited as authority for these restrictions.[1]

Approximately 2,000 students attend Hawkeye Institute of Technology in Iowa. Although potentially 40 clubs are permitted to use campus facilities for their meetings, the Inter-Varsity Christian Fellowship was denied equal access in 1982. As there were no less restrictive alternatives available to them, denial of equal access resulted in the group's demise.

---

[1] Appropriation for sectarian schools: Instruction in denominational doctrines

> No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State. CAL CODE, Art. IX, Section 8, (Deering).

The Area Vocational Technical Institutes (A.V.T.I.) in Minnesota offer post secondary education and training to students ranging in age from 18 to 50. The position of the various school boards illustrates the divergent and inconsistent policies regarding access to campus facilities. Some, but not all, freely grant equal access. At Alexandria A.V.T.I. (approximately 1,000 students) the policy changed from no access to equal access under a new administration. About 100 miles away at Hutchinson A.V.T.I. permission could not be obtained to post announcements of a student-initiated, student-led Bible study.

At Truckee Meadows Community College in Nevada, with an enrollment of 10,000 students, an Inter-Varsity chapter was refused official recognition as a student group. The students are permitted to assemble, but they are not permitted to reserve rooms or publicize on the same basis as other student groups. A similar situation exists at Tulsa Junior College, Oklahoma.

Documentation is on file for other students similarly situated on other campuses. These illustrate the resultant discrimination at the post-secondary level, since local school districts, which do not apply the *Widmar* principle at the secondary level, often do not distinguish between secondary and post-secondary schools under their control.

B. *Such Content-Based Speech Discrimination is Impermissible at the Post-Secondary Level.*

The court below found the school district had created a limited public forum. *Bender v. Williamsport Area School District*, at 548. Therefore, to justify discriminatory exclusion from the forum based on religious content of speech, the school's officials have an obligation to apply Constitutional norms. They must show that the school district's regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Widmar, supra* at 271.

In *Widmar, supra* at 275, this Court held that once a public university created a forum generally accessible to student groups it could not then exclude religious speech or seek to enforce a content-based discrimination against such speech. This Court so held on the rationale that a religious organization's enjoyment of mere "incidental" benefits did not violate the Constitutional prohibition against the "primary advancement" of religion. *Id.* at 273. Any religious benefits derived from an open forum were "incidental" in that (1) an open forum at a public university "did not confer any imprimatur of state approval on religious sects or practices"; and (2) the forum was available "to a broad class of nonreligious as well as religious speakers." *Id.* at 274.

Although this Court did acknowledge that "university students are, of course, young adults" and as such, "are less impressionable than younger students," (*Id.* at 274, n.14), it is significant to note that nowhere in its decision did this Court expressly limit its holding to students attending traditional baccalaureate public universities or even to post-secondary schools. Moreover, it is readily observed that the forum created by locally governed colleges and vocational institutions is comparable to the state university. The freedoms enunciated by this Court in *Widmar* clearly should apply equally to all post-secondary students. They are not applied equally because some post-secondary students attend post-secondary schools governed by the local high school board of education.

II. Failure to Apply Court-Articulated Objective Standards Will Deprive Both Secondary and Post-Secondary Students of a Protected Right.

Students in secondary schools do not "shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Quoting *Burnside v. Byars*, 363 F.2d 749 (1966), the Court

reaffirmed the principle that where there is no finding or showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition of speech or expression cannot be sustained. The burden of proof, therefore, is on the school board to show that the forbidden conduct materially and substantially interfered with the requirements of appropriate discipline in the operation of that school.

In the case at bar, there is no showing that Petros' activities interfered in the slightest with the operation of the school. On the contrary, Petros carefully complied with the school's regulations, even imposing further self-restraint because of its religious purpose. Petros was willing to substitute a non-employee adult for the teacher who monitored attendance and discipline from a distance. Furthermore, Petros voluntarily relinquished the rights granted other groups to publicize activities lest it compromise the position of the school and cause it to encounter the risk of excessive entanglement.

Rather than applying the objective standards of "material and substantial interference" in the discipline and operation of the school, the court below relied on vague premonitions and unsubstantiated fears to reach its conclusion that Petros should be excluded from the forum it had created. Although it cannot be questioned that the school officials have comprehensive authority, such authority must be exercised "consistent with fundamental constitutional safeguards" *Tinker v. Des Moines Independent School District, supra.* Failure to do so deprived these students of a valuable right that this Court has consistently sought to protect. If the lower court's decision is allowed to stand, post-secondary students as well risk imposition of limits on freedom of speech and expression—a result clearly contrary to the holding of this Court in *Widmar.*

CONCLUSION

The lower court's decision, which effects an unconstitutional content-based discrimination on secondary and post-secondary students alike, for the reasons cited herein, should not be allowed to stand.

Respectfully submitted,

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a public high school violates the Establishment Clause if it permits a voluntary student religious club to meet on school property during a student activities period in which all other voluntary student groups are permitted to meet.

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INTEREST OF THE UNITED STATES

The question in this case is whether the First Amendment requires a public high school to exclude a voluntary student religious club from meeting on school property during a student activities period in which all other voluntary student groups are permitted to meet. The interest of the United States arises from recent congressional legislation addressing this issue.

After extensive hearings and debate, the Equal Access Act (Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.*) (set forth in full at Pet. App. 113a-115a) was passed by the Congress and signed by the President on August 11, 1984. The Act makes it unlawful for any public secondary school receiving federal aid and having a "limited open forum" to deny access to students who wish to conduct a meeting, on the basis of the "religious, political, philosophical, or other content of the speech at such meetings." See pages 6-7, *infra*. The court of appeals, in contrast, held that for a public high school

to allow a voluntary religious club to meet on school premises during a student activities period would violate the Establishment Clause. If allowed to stand, the decision of the court of appeals would thus cast doubt on the constitutionality of the Equal Access Act.[1] While the constitutional holding of the court of appeals might be limited to meetings conducted during the hours of compulsory school attendance (see Pet. App. 28a, 43a), the reasoning of the court on the central question—whether high school students are capable of distinguishing between a neutral forum and official endorsement of religion—would be difficult so to confine.[2] Thus, although this case was brought (and the decision below rendered) before the Equal Access Act was enacted,[3] the court of appeals' reasoning

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[1] One State Attorney General, in reliance on the decision below, has formally opined that the Equal Access Act is unconstitutional, and has, in effect, instructed State educational officials not to comply with it. 69 Op. Md. Att'y Gen. No. 84-031 (Dec. 6, 1984). The American Association of School Administrators has distributed guidelines for implementing the Equal Access Act, which are prefaced by the advice that states covered by the Third Circuit (among others) "could be out of compliance with previous circuit court rulings if they act to implement the law." American Ass'n of School Administrators, *Equal Access: Interpretation and Implementation Guidelines* 1 (1984). These examples demonstrate that the decision below is having a direct effect on implementation of the Act.

[2] The Equal Access Act applies only where the student activities occur "before actual classroom instruction begins or after actual classroom instruction ends" (§ 803(4), 98 Stat. 1303). This is not necessarily the same as the hours of compulsory school attendance, as this case illustrates. Where, as here, the limited open forum occurs at the beginning of the day (or after a brief opening homeroom during which no "actual classroom instruction" occurs), the plain language of the Act indicates that it would apply despite the fact that the activities period is covered by compulsory attendance laws. The legislative history, however, is ambiguous on this point. Compare 130 Cong. Rec. S8354 (daily ed. June 27, 1984) (remarks of Sens. Metzenbaum and Hatfield), with *id.* at S8355-S8356 (daily ed. June 27, 1984) (remarks of Sen. Denton); *id.* at H7735-H7736 (daily ed. July 25, 1984) (remarks of Rep. Bonker).

[3] This case provides no occasion for interpretation of the Equal Access Act. The free speech rights of petitioners recognized by

would suggest that implementation of the Act in most situations would be unconstitutional.

STATEMENT

1. Williamsport Area High School is located on a 147-acre campus, more than a mile from the nearest residence (J.A. 70). Most students are bused to the school (J.A. 68-69). The school day starts at 7:45 a.m., with a 12-minute homeroom period, during which attendance is taken and announcements made (J.A. 102).

On Tuesdays and Thursdays, the opening homeroom period is followed by a 30-minute period for extracurricular student activities (Pet. App. 69a n.5). During this time, students may attend student club meetings, study in the library, visit the computer station, examine career or college placement materials, or stay in their homerooms (*id.* at 7a-8a). The student clubs that meet during this activities period are entirely voluntary (*id.* at 8a). There is no written policy concerning what type of club may be allowed to meet. However, the principal stated that he would permit any lawful club that would "contribute to the intellectual, physical or social development of the students" (*id.* at 9a; J.A. 104). This principal has served since 1974; in his memory, no student club had ever been denied permission to meet, until this case (Pet. App. 8a; J.A. 102-104).

This case arose out of a request by students at the school to form a club for the purpose of meeting to read and discuss the Bible and to pray. The club (called "Petros") agreed not to publicize its meetings through the school's public address system, bulletin board, or newspaper. Pet. App. 33a. The club initially was allowed

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both courts below are at least as broad as their rights under the Act. Only in the event that this Court should reverse the decision below on both free speech and establishment grounds—*i.e.*, hold that petitioners' free speech rights were not infringed but that to allow petitioners to meet would not violate the Establishment Clause—might it be necessary to determine, on remand, whether the Act applies to this case.

to meet during the activities period. The first meeting was attended by 45 students (out of a student body of 2,500). *Id.* at 4a-6a, 68a-71a; J.A. 53. In accordance with school policy, a teacher was present during the meeting, took attendance, and thereafter sat in the room grading papers (Pet. App. 9a-10a, 69a-70a). After the first meeting, the school superintendent obtained an opinion of counsel to the effect that allowing the club to meet on school property would violate the Establishment Clause. On this basis, the superintendent denied the club further permission to meet during the activities period. J.A. 39-40, 92-93. The students were offered the alternative of released time during which they could conduct their meetings away from school property. Pet. App. 71a-72a. While the record does not show why they declined this alternative, it was obviously impractical in view of the location of the school (over a mile from the nearest residence) and the brief duration of the activities period (30 minutes).

The superintendent's decision was affirmed by respondent School Board (Pet. App. 72a). The Board's action was based solely on advice of counsel that "[p]resent law simply does not permit public schools to authorize or support religious activities on school property" (*id.* at 6a; J.A. 48-49). The Board has never suggested any programmatic, disciplinary, or educational reason for excluding the group. The school principal specifically stated that he did not think the group would be disruptive. J.A. 84.

2. The students then brought this action for declaratory and injunctive relief against the School Board and its members, in both their individual and official capacities (J.A. 13). Relying on *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the district court held that the high school had created a "limited public forum" by establishing an activities period open to any legitimate student activity, and rejected the Board's argument that allowing Petros to meet would violate the Establishment Clause. Since this

was the only rationale for the exclusion, the district court concluded that under the First Amendment this "content-based decision to exclude subject matter" could not stand. Pet. App. 81a-82a.[4]

After the district court decision, respondent School Board decided to comply with the decision and not to appeal. Respondent John C. Youngman, Jr., a member of the Board and parent of children attending Williamsport High School, appealed.[5] A divided panel of the court of appeals reversed. While agreeing that the school had created a limited public forum in its activities period, and thus that the students had a "valid first amendment interest to engage in their proposed activity" (Pet. App. 20a-21a), the court "balanc[ed] the respective constitutional interests [free speech and nonestablishment] which would be lost and gained if Petros were granted

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[4] The district court acknowledged that if the activities period were part of the school's curriculum, the superintendent would have had wide discretion to limit subject matter as part of his power to define the curriculum. However, the court pointed out that the sole reason offered for excluding Petros was legal advice regarding the Establishment Clause; the superintendent never purported to be exercising his authority to define the curriculum. Pet. App. 82a-85a.

[5] After the briefs were filed in the court of appeals, respondent Youngman ceased to be a member of the School Board. As none of the parties disputes, however, there remains a case or controversy, since the student petitioners continue to desire to meet, and the School Board continues to refuse permission. That the School Board is a nonlitigating respondent (in effect, a disinterested "stakeholder") does not affect this, since the Board (by relying on the court of appeals' judgment as a basis for not complying with the district court's judgment against it and by resisting attorneys' fees) has in effect treated the appeal by respondent Youngman as its own. Having been sued in his individual as well as his official capacity, respondent Youngman has standing as appellant below and respondent herein to defend his interests as parent of children in the school; if he is correct on the merits, his children's right to attend public school free from unconstitutional religious influences would be infringed if petitioners were to prevail.

The matters were brought to the attention of the court of appeals (see Pet. for Reh'g 5 n.2), which implicitly held that the case remained justiciable.

access to the activity period" (*id.* at 42a), and concluded that "there is a greater vindication of the protections of the Constitution if the Establishment Clause prevailed in this instance" (*id.* at 43a).

As a result of the court of appeals' decision, the School Board has reverted to its former policy of denying the students the right to participate in the activities period (Pet. App. 109a-110a).

3. Within a few weeks after the court of appeals' decision, Congress passed the Equal Access Act, Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.* (see Pet. App. 113a-115a). The purpose of the Act was to "clarify and confirm" the First Amendment rights of high school students in this context, and thereby "resolve the dilemma" school administrators believed they faced in reconciling the assertedly conflicting demands of free speech and nonestablishment. S. Rep. 98-357, 98th Cong., 2d Sess. 3, 21 (1984). Supporters of the Act in Congress relied heavily on the district court decision in the instant case (*id.* at 7; H.R. Rep. 98-710, 98th Cong., 2d Sess. 3, 5 (1984)),[6] and the factual circumstances of this case were used as an example of the need for legislation (see, *e.g.*, *id.* at 5).

The Act prohibits public schools receiving federal financial assistance from "deny[ing] equal access or a fair opportunity to, or discriminat[ing] against, any students who wish to conduct a meeting" within a "limited open forum" established by the school, on the basis of "the religious, political, philosophical, or other content of the speech at such meetings." "Limited open forum" is defined as granting access for noncurriculum-related student groups to meet on school premises "during noninstructional time," which is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." The school is "deemed to offer a fair opportunity to students" if it pro-

[6] Congressional consideration of the Act was completed before the members of Congress became aware that the district court decision below was reversed by the court of appeals.

vides, on a uniform basis, that meetings be "voluntary and student-initiated"; that there be "no sponsorship of the meeting by the school"; that "employees or agents of the school or government [may be] present at religious meetings only in a nonparticipatory capacity"; and that "nonschool persons may not direct, conduct, control, or regularly attend" such meetings. §§ 802, 803, 98 Stat. 1302, 1303.

INTRODUCTION AND SUMMARY OF ARGUMENT

The premise of the decision below is that the various component freedoms protected by the First Amendment—free speech and nonestablishment most particularly, free exercise and free association by implication—are in conflict and require judicial "balancing." The court determined that petitioners' free speech rights are outweighed by the Establishment Clause. We submit that, properly viewed, these components of the First Amendment do not generate the conflict that so troubled the court below. If the scope and meaning of the clauses of the First Amendment are more precisely conceived, there is no need to "balance" the "competing interests protected by each constitutional provision" (Pet. App. 40a).

The guarantees of freedom of speech and free exercise of religion, though obviously not identical, fit together in an altogether coherent way. Much religious expression is also protected as free speech: religious discussion, teaching, and persuasion are protected both as speech and as exercise of religion. To hold otherwise would invite an inadmissible distinction in terms of the contents of the expression. It would be strange indeed if because religious expression is doubly protected by the constitutional text it should therefore be less protected in practice. Prayer, whether individual or group prayer, is no less speech merely because the speakers may speak together, and surely not because those praying may believe that as they speak together they speak also to God.[7] Even

[7] This Court's school prayer decisions did not depend on a finding that prayer is not protected speech, but on the conclusion that the

religious ceremonials—so long as they are confined to speech, song, or gesture—must be indistinguishable in the eyes of the state from other forms of protected expression. As speech, religious expression is as protected as—and has no need to be more protected than—other forms of expression.

It is when religious practice travels beyond speech to action that the additional protections of the Free Exercise Clause come into play. While that travelling beyond speech opens the door for government regulation (*United States* v. *O'Brien*, 391 U.S. 367 (1968); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940)), it is likewise in that context that the Free Exercise Clause offers special and additional protection to religious action. See, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

The Establishment Clause is a consistent and harmonious element in this scheme. The Establishment Clause forbids governmental endorsement of any or all religions and forbids as well the exercise of government authority to implicate unwilling citizens in religious practice. It thus helps to preserve free exercise and free speech by guaranteeing to the individual the choice of the religious faith (if any) he will observe and to which he will lend his voice. Insofar as the Free Exercise Clause and legislative religious accommodations go beyond mere neutral protection of speech to provide special protection for the liberty of religious exercise, the Establishment Clause serves to ensure that the government does not go beyond accommodation to endorsement, religious favoritism, or subtle coercion. Even in cases of accommodation, however, there is no necessary conflict or inconsistency between the two Religion Clauses. An inherent conflict between the two Religion Clauses exists only on the extreme and unnecessary premise that to leave an extra measure of freedom to religious exercise constitutes an endorse-

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state acts unconstitutionally if it endorses a particular religious exercise by incorporating it as part of the official activity of the classroom.

ment of religion or that to relieve burdens on religious exercise implicates other citizens in its exercise.

The instant case, far from presenting the agonizing dilemma felt by the court below, does not even approach the boundaries of the constitutional categories we have set out. This is not a case where government is being asked to accommodate religion to the point that unwilling citizens are in danger of being implicated in the practices of others. It is not even a case where the special solicitude for religion mandated by the Free Exercise Clause is brought into play. In this case, exactly, as in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the exercise of religion is no more than the exercise of the freedom of speech: it requires no special protection beyond that accorded all legitimate expression, and certainly warrants no less.

Widmar v. *Vincent*, *supra*, thus provides the appropriate precedential backdrop for this case. In *Widmar*, this Court held that a state university could not, consistent with the First Amendment, deny permission for a voluntary student group to use university facilities for its meetings solely on the basis of their religious content, where those facilities were made available to other student groups. The decision below distinguishes *Widmar* on the ground that high school students are less capable than college students of understanding that permission for a religious group to meet would not constitute state endorsement of religion. There is no basis for this distinction. Congress has found, on detailed inquiry of students, educators, and psychologists, that high school students are capable of understanding that neutral treatment of religious groups does not imply state endorsement. Moreover, decisions of this Court and lower courts holding that secondary school students have a First Amendment right to engage in speech on controversial topics presuppose that students are capable of learning from exposure to diverse viewpoints, without believing that all viewpoints expressed represent official orthodoxy. Finally, if students were to assume that allowing religious meetings would imply offi-

cial endorsement of religion, then they would just as easily assume that prohibiting religious meetings (while allowing meetings with a secular content) implies official disapproval of religion—a result that is equally at variance with the Establishment Clause.

There is no other basis for distinguishing *Widmar* v. *Vincent, supra.* So long as attendance at the student meetings is completely voluntary, the fact that compulsory attendance laws require students to be on the school property does not mean that they are compelled to undergo religious exposure. Nor is there any evidence that a voluntary group in this high school (which has some 2,500 students) is any more conspicuous than a similar group in a college of comparable size. Finally, the presence of adult monitors at the group's meetings, solely for the purpose of maintaining order, no more implies state approval of religion than does the provision of police or fire protection for church functions.

The students in this case are not asking for affirmative accommodation of religion; they ask only that student religious groups be treated in the same manner as any other student group. Their only request is that the state be neutral toward religion—a request fully in accord with the basic values of the First Amendment.

ARGUMENT

THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE PUBLIC SCHOOL AUTHORITIES TO EXCLUDE A VOLUNTARY, STUDENT-INITIATED AND STUDENT-RUN RELIGIOUS CLUB FROM AN ACTIVITIES PERIOD DURING WHICH OTHER STUDENT GROUPS ARE PERMITTED TO MEET

This case raises what has become one of the most hotly contested isues in the area of free speech and religion: whether high school students wishing to meet for purposes of voluntary, student-initiated, and student-directed religious discussions must be excluded from forums within the high school otherwise available to all. The question is whether the students *must be* excluded—

not whether they *may be* excluded—because the only reason respondent School Board has offered for excluding the students is their lawyers' advice that the Establishment Clause so commands. There is no issue regarding the propriety of school authorities limiting the school forum to curriculum-related discussions and activities, and thus no issue of the school authorities' control over the content of the curriculum. Rather, here as elsewhere, high school authorities have determined that the students would benefit from the opportunity to meet together for student-initiated, student-directed activities of their choice. J.A. 67, 90. Only because of the advice of their attorneys have they decided that they must restrict the subjects of their students' discussions. Pet. App. 66a.[8]

This case is therefore typical of so-called "equal access" cases elsewhere, in that the actual conflict is not between the students and the high school authorities. The conflict is between students and a view of the law—a view that equal treatment of religious speech in the high school setting would somehow violate the Establishment Clause of the First Amendment. As Congress found in its recent investigation into the issue, "many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity." S. Rep. 98-357, 98th Cong., 2d Sess. 6 (1984); accord, H.R. Rep. 98-710, 98th Cong., 2d Sess. 3 (1984). The reason, Congress found, is not "malevolence toward religion" but the administrators' "erroneous[ ] belie[f] that the Establishment Clause prohibits students from engaging in such speech at all, even when

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[8] Neither the First Amendment nor the Equal Access Act limits the discretion of school officials in deciding whether to create a forum for free expressive activity. The Act simply provides that, if such a forum is created, the school may not "deny equal access or a fair opportunity" to students "on the basis of the religious, political, philosophical, or other content" of their speech (§ 802(a), 98 Stat. 1302). See *Police Dep't* v. *Mosley*, 408 U.S. 92, 96 (1972): "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say."

other types of extracurricular student speech are permitted." S. Rep. 98-357, *supra*, at 6; accord, H.R. Rep. 98-710, *supra*, at 3, 4.

A. The Establishment Clause Does Not Authorize The Government To Single Out Religious Speech And Association For Direct Discriminatory Prohibition

The court below concluded unequivocally that "the students of Petros enjoy a free speech right to engage in religious activity" in this context (Pet. App. 36a; see *id.* at 11a-21a), but held also that "allowing such religious activity would violate the mandate of the Establishment Clause" (*id.* at 36a). In order to resolve this perceived "constitutional conflict of the highest order" (*ibid.*), the court of appeals engaged in an unprecedented constitutional cost-benefit analysis, "weighing the competing interests protected by each constitutional provision, *given the specific facts of the case*, in order to determine under what circumstances the net benefit which accrues to one of these interests outweighs the net harm done to the other" (*id.* at 40a (emphasis in original)). The court acknowledged that under this approach "some constitutional protections must unavoidably be abridged," but deemed its "role" as being to "maximize, as best as possible, the overall measure of the fundamental rights created by the Framers" (*ibid.*).

If there need be any "balancing" of interests at all (Pet. App. 11a), we submit that the court incorrectly balanced the constitutional interests involved in this case, elevating a highly speculative possibility of Establishment Clause injury over a concrete, selective, injury to petitioners' rights of free speech, association, and religious expression. We believe that the resolution reached by the district court (and by Congress) is plainly more neutral, administratively less entangling, and more protective of liberty than the courts of appeals' alternative. More to the point, if, as the court of appeals held, constitutional provisions applicable to this case are in "unavoidable tension" (Pet. App. 38a) and "present a close

question" (*id.* at 41a), there is no warrant for judicial intervention. See *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982) ("we know of no principled basis on which to create a hierarchy of constitutional values"; a court cannot say that another provision of the Constitution is "in some way less 'fundamental' than the Establishment Clause"). If the court below is correct in its analysis of the problem, the proper conclusion is that there is no clear constitutional impediment to implementing the decisions of the elected government officials involved—Congress and the School Board.

More fundamentally, however, we submit that the court of appeals misperceived the relationship between the Establishment Clause and other provisions of the First Amendment. The First Amendment is not so strangely inharmonious that to enforce one provision is to violate another. The Establishment Clause, no less than the Free Speech or Free Exercise Clauses, was intended as a guarantee of liberty. By prohibiting an official orthodoxy, the Establishment Clause promotes "diversity and pluralism in all areas" (*Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 8). It was not the intention of the drafters of the Establishment Clause to inhibit the creation of wide-open forums for discussion of ideas.

We begin with the proposition that religious expression, as a form of speech, is entitled to *no less* protection under the First Amendment than any other category of expression. *Widmar* v. *Vincent*, 454 U.S. 263, 269 & n.6 (1981); cf. *Healy* v. *James*, 408 U.S. 169 (1972). The great cases of this Court upholding the right of free speech frequently deal, not surprisingly, with speech of a religious nature. See *e.g.*, *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943).

Indeed, religious expression and related aspects of religious practice are entitled in some contexts to pro-

tections that go *beyond* those extended to comparable forms of belief, either as a matter of legislative policy (see, *e.g.*, *Gillette* v. *United States*, 401 U.S. 437 (1971); *Zorach* v. *Clauson*, 343 U.S. 306 (1952)), or as a matter of constitutional law (see, *e.g.*, *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943)). "[T]he Constitution * * * affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, slip op. 4. Cases of legislative accommodation can present difficult constitutional questions, with which this Court has had to grapple in recent Terms. See, *e.g.*, *Estate of Thornton* v. *Caldor, Inc.*, cert. granted, No. 83-1158 (Mar. 5, 1984); *Wallace* v. *Jaffree*, prob. juris. noted, No. 83-812 (Apr. 2, 1984); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). But there is not a single instance in which this Court has accepted the argument—though it has often been made—that because of the Establishment Clause or related policy considerations a unit of government is justified in singling out religious speech for discriminatory suppression. See, *e.g.*, *Widmar* v. *Vincent*, *supra*; *McDaniel* v. *Paty*, 435 U.S. 618 (1978); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); see also *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *McCreary* v. *Stone*, 739 F.2d 716 (2d Cir. 1984), aff'd by an equally divided Court, No. 84-277 (Mar. 27, 1985); *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979).[9]

The drafters of the Bill of Rights had no intention to place religionists or religious speech under any special

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[9] This should be distinguished from the more difficult question of when, or whether, an individual beneficiary's use of tax-supported governmental financial assistance may be restricted because of the religious implications of the expenditure. See, *e.g.*, *Witters* v. *Washington Comm'n for the Blind*, cert. granted, No. 84-1070 (Apr. 1, 1985). In such cases, the interests of other persons—the taxpayers—in not being coerced into supporting activities of a religious nature must be considered. There are no such third party interests here.

disabilities, even within the public arena. See *McDaniel* v. *Paty*, 435 U.S. at 641 (Brennan, J., concurring). Indeed, it is no exaggeration to state that the result below is *directly contrary* to the orginal intent, and that it interprets the Establishment Clause in a manner expressly feared and sought to be avoided by its drafters. The principal point of criticism of the early drafts of the Establishment Clause by members of the First Congress was that it might be interpreted in a way that would be "extremely hurtful to the cause of religion." 1 Annals of Congress 758 (Aug. 15, 1789 (J. Gales ed. 1834)) (remarks of Rep. Huntington); see also *id.* at 757 (remarks of Rep. Sylvester). The response of James Madison, principal author of the draft Amendment, was that "the object it was intended to prevent" was that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform" (*id.* at 758-759; see also *id.* at 758). A policy of equal access for all groups is precisely the ideal envisioned by the Founders. An exclusion of religious groups from a forum otherwise open to all offends the very core of the First Amendment. *Widmar* v. *Vincent, supra; Niemotko* v. *Maryland, supra;* see generally M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 6-17 (1978).

This case does not require the Court to explore the limits of affirmative accommodation of religion; the student petitioners ask only that they be treated in the same way as any other student group. See *Widmar* v. *Vincent*, 454 U.S. at 273 n.13. They seek tolerance, equal treatment, nondiscrimination. The Establishment Clause does not authorize—and the Free Speech Clause prohibits—the singling out of religious speech for direct discriminatory prohibition.

These principles are relatively well-settled in most contexts; however, their application in the high school setting has divided and perplexed the lower federal

courts.[10] The special character of the public schools warrants special sensitivity to potential Establishment Clause problems in that setting. However, the reasons that have been offered for denying to these petitioners—these high school students—First Amendment protections they would receive as adults in other public settings (*Widmar* v. *Vincent, supra*), and indeed as high school students if their speech were of a different, secular, sort (see pages 19-20, *infra*) are not persuasive.

B. The Presumed Greater Impressionability Of High School Students Is Not A Basis For Permitting Discrimination Against Religious Speech

Widmar v. *Vincent, supra,* is the paradigm from which all discussions of the issue in this case begin. If *Widmar*, which arose in a university setting among university students, is applicable as well to a high school setting and high school students—a question impliedly left open in *Widmar* (454 U.S. at 274 n.14)—then petitioners' free speech claim is irrefutable and no Establishment Clause obstacles exist that might preclude vindication of their rights. The court of appeals acknowledged (Pet. App. 25a) that "[a]ll" of the considerations distinguishing this case from *Widmar* "are an outgrowth of the differences between a high school and a university." Principal among those differences, according to the court of appeals, is the different "maturity and impressionability" of high school students. That is, high school students "would be less able to appreciate the fact that

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[10] Compare *Brandon* v. *Board of Education,* 635 F.2d 971, 978 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981); *Lubbock Civil Liberties Union* v. *Lubbock Independent School District,* 669 F.2d 1038, 1045-1046 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983); and the decision below, with *Nartowicz* v. *Clayton County School District,* 736 F.2d 646, 649 (11th Cir. 1984); *Amadei* v. *Spring Branch Independent School District,* No. H-84-4673 (S.D. Tex. Apr. 26, 1984) (bench ruling); *Bell* v. *Little Axe Independent School District No. 70,* No. CIV-81-620-T (W.D. Okla. Mar. 14, 1983), appeal docketed, No. 83-1458 (10th Cir. Apr. 5, 1983); and *Reed* v. *Van Hoven,* 237 F. Supp. 48 (W.D. Mich. 1965).

permission for Petros to meet would be granted out of a spirit of neutrality toward religion and not advancement." *Ibid.* We submit that this conclusion is based on faulty empirical assumptions and cannot withstand analysis.

1. The notion that high school students are too impressionable to understand that the school's neutral treatment of a religious club would not constitute official endorsement of religion was investigated in detail by Congress in its consideration of the Equal Access Act. An express congressional finding that high school students are mature enough to understand the difference between school accommodation and school endorsement of religion was the premise of the Act's prohibition on public secondary schools with "limited open forums" excluding activities on the basis of their religious content.

The Senate Report on the legislation stated: "[t]he Committee finds that students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led, religious speech on the one hand and student-initiated, student-led religious speech on the other." S. Rep. 98-357, *supra*, 35; see *id.* at 9-10. This "exercise of [the Committee's] fact-finding powers" (*id.* at 9) was based in part on the expert views of psychologists (*id.* at 35), and in part on the testimony of many witnesses, including high school students (*id.* at 10).[11] Supporters of the legislation in the House

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[11] For example, a high school student from Sonoma, California testified:

> They also have a smoking section in our school. Does that mean that the school sanctions, supports and encourages smoking? I doubt it, just because the school allows a group to meet, doesn't mean it approves of and supports their activities. The same should hold for religious groups.

Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 64 (1983) (testimony of Sarah Scanlon). Another student, from Lubbock, Texas, testified:

> Some people are worried that high school students are very impressionable, and that we can't make decisions and that we

expressed a similar view.[12]

Where Congress has made findings of fact in the discharge of its legislative function, due regard for the separation of powers and for the ability of the legislature to gather information and analyze issues of legislative fact requires that courts defer to congressional determinations, even for purposes of constitutional adjudication, unless those determinations can be said to be irrational. See, *e.g.*, *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532-533 (1982); *Rostker* v. *Goldberg*, 453 U.S. 57, 74, 80-83 (1981); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981); *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R.I. & Pac. R.R.*, 393 U.S. 129, 136, 138-139 (1968); *Katzenbach* v. *Morgan*, 384 U.S.

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are naive. I feel that that is pretty naive on the part of the people who think that. I don't think that is true at all.

Id. at 60 (testimony of Bonnie Bailey). See also, *e.g.*, *ibid.* (testimony of Lisa Bender); *Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 39 (1983) (testimony of C. Luke Thornton, Principal of John I. Leonard High School, Lake Worth, Fla.).

[12] See, *e.g.*, 130 Cong. Rec. H7727 (daily ed. July 25, 1984) (remarks of Rep. Roukema) (disputing claim that "allowing religious groups to meet in the school under any circumstances will have the effect of advancing religion because of the impressionability of high school students" and stating that "studies of adolescent psychology * * * have shown that it is a time of increased cognitive capacity, marked by an ability of the adolescent to differentiate himself from authority figures he depended upon as a younger child"); *id.* at H7724 (remarks of Rep. Frank) ("I regard this as a very auspicious day [for] * * * those of us who think we ought not infantilize teenagers."). These views reflect the conclusions of a recent survey of the psychological literature, which concluded that "[g]iven the increased cognitive capacity and the psychological separation between the self and authority figures that occurs during adolescence, high school may in fact be a time when the distinction between tolerance based on mutual respect and explicit approval of student expression is particularly clear—even more clear, perhaps, than in later stages of life." Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-509 (1983) (citing psychological studies).

641, 653 (1966); *Katzenbach* v. *McClung*, 379 U.S. 294, 299-301 (1964); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 94-95 (1961). As Justices Brennan, White, and Marshall stated in their concurring and dissenting opinion in a case involving a similar question—the maturity of 18-21 year olds—*Oregon* v. *Mitchell*, 400 U.S. 112, 247-248 (1970) (citations omitted): "[T]he nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as 'arbitrary,' 'irrational,' or 'unreasonable.'" Cf. *Katzenbach* v. *Morgan*, 384 U.S. at 668 (Harlan, J., dissenting) ("[t]o the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect").

Particularly in this case, where the court of appeals' conclusions regarding student immaturity were based on pure speculation, and where the district judge came to a contrary factual conclusion, the Congressional findings—based as they were on actual testimony—should carry considerable weight.

2. There is a curious inconsistency between the decision below and decisions involving the First Amendment rights of high school students regarding non-religious matters. See, *e.g.*, *Board of Education* v. *Pico*, 457 U.S. 853 (1982) (plurality); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Seyfried* v. *Walton*, 668 F.2d 214, 219-220 (3d Cir. 1981) (Rosenn, J., concurring); *Russo* v. *Central School District No. 1*, 469 F.2d 623, 633 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973). These decisions presuppose that high school students are capable of learning from exposure to a diversity of viewpoints, without confusing free expression with official orthodoxy.[13] Thus, school au-

[13] In *Tinker*, this Court held that schoolchildren had a First Amendment right to wear black armbands while in school as a

thorities have been prohibited from censoring the expression of controversial views by teachers and school-sponsored newspapers—situations in which there is a much greater risk than in the present case of the views being imputed to the school itself. *James* v. *Board of Education*, 461 F.2d 566, 574 (2d Cir.), cert. denied, 409 U.S. 1042 (1972) (teacher wearing black armband in classroom to protest Vietnam War); *Gambino* v. *Fairfax County School Board*, 429 F. Supp. 731, 736-737 (E.D. Va.), aff'd, 564 F.2d 157 (4th Cir. 1977) (article in school newspaper entitled "Sexually Active Students Fail to Use Contraceptives"); *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1975) (Table) (school newspaper with information on birth control); *Shanley* v. *Northeast Indep. School Dist.*, 462 F.2d 960, 970-972 (5th Cir. 1972) (school newspaper with articles on drugs and birth control).

There is surely no reason to assume that expression of religious views will play any more powerfully upon the imagination of high school students than such subjects as sex, drugs, or political activism. If students are able to perceive that their peers' opinions on sexuality or military conscription are not those of the school administration, the same will be true of their peers' opinions on religion.

3. If high school students (unlike college students) would construe approval of a religious club's request for permission to meet as endorsement of religion, why would they not also construe disapproval of the application as official hostility to religion—a result equally at variance with the Establishment Clause? The district judge in this case concluded that a policy of singling out religious

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symbolic protest to the Vietnam War. Testifying in support of equal access legislation, Professor Laurence Tribe commented: "no conceivable principle of distinction can suggest that students who have a right to wear black armbands to protest the war suddenly lose that right if they utter the name of God in the process, or if, heaven forbid, they should do it as a group instead of single file." *Religious Speech Protection Act: Hearing on H.R. 4996 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 2d Sess. 47 (1984).

groups for exclusion from the school's activities period could well be viewed by the students as manifesting official hostility toward religion. Pet. App. 97a.

Respondent School Board itself apparently recognized that its action might be construed as hostility toward Petros' religious character. The letter from the Board to the students explaining the decision included the following (Pet. App. 6a; J.A. 48-49):

> Please be assured that neither the School Board, nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.

It is not surprising that the Board apprehended that the students might construe its action as indicating that the group was "unworthy," since, as the court of appeals noted (Pet. App. 8a), Petros is the only proposed student club or activity ever denied the right to participate in the school's activities period during the memory of the principal. J.A. 75.

The impression of state hostility to religion caused by exclusion of religious groups is not unique to this case. In its consideration of the Equal Access Act, Congress heard testimony to that effect from students, and found that many students have in fact perceived their schools' refusal to allow religious activity as manifesting discrimination and official hostility. The Senate Committee concluded that "students reasonably perceive the denial of access for religious speech as State hostility toward religion" (S. Rep. 98-357, *supra*, at 36), and stressed that "[t]he perception of State hostility is not a speculative one created by the Committee, but one held by students as evidenced by the testimony of the students themselves." *Id.* at 11, 19-20.

If it were true that high school students are too immature to appreciate the difference between neutral school actions and endorsement of (or hostility toward) religion, then school officials could not avoid violating the Establishment Clause, whether they granted or denied a

request for equal access. *Any* action on a religious group's request for permission to meet would convey a state position regarding the merits of religion, according to this view. The only way out of the dilemma would be for the school to close its limited public forum—that is, to forbid any voluntary student activities on school property. Surely the Constitution does not require such a result.

4. The court of appeals appeared to place great weight on its view that "nonconforming students" might be "ostracize[d]" or "stigmatize[d]" by the Petros meetings, because of the force of "peer pressure inherent in a high school environment" (Pet. App. 44a). Accord, *Brandon* v. *Board of Education*, 635 F.2d at 978. We would note, however, that there is absolutely no evidence in the record that any student at Williamsport High School has felt pressured or coerced into joining Petros, as opposed to participating in any of the other 25 student groups authorized to meet at the same time. Indeed, Petros, alone of the student organizations, has agreed to eschew various forms of school publicity—inclusion in the yearbook and school newspaper and access to the public address system—that might be viewed as instruments of "peer pressure." The fact that Petros has never attracted more than 45 students (out of 2500) makes the court of appeals' hypothetical concerns seem quite overstated.[14]

More troubling as a legal matter is the court of appeals' unstated assumption that, in this context, the Establishment Clause operates to restrain individuals—and not just governments—from propagating their beliefs.

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[14] Indeed, the court of appeals' unexamined assumptions regarding the peer pressures actually experienced by students at a modern high school may be unrealistic. One of the powerful motivating factors for the formation of a group like Petros, as one member told a Senate subcommittee (*Equal Access: A First Amendment Question, supra*, at 44 (testimony of Lisa Bender)), is the need of religiously-oriented students to "know[] that other students were behind you in what you believed." To permit so-minded students to meet together may well be a means for helping them to withstand peer pressure of a different and more powerful sort.

As the district court noted (Pet. App. 91a), "[a]ny advancement of religion would come from the students themselves, and this the Establishment Clause does not bar, it being a limitation on government conduct rather than on individual activity." The neutral provision of a forum—a meeting place—does not somehow transform the private conduct of the students into an establishment of religion.

Moreover, if "peer pressure" is the problem, preventing Petros meetings is no solution, for Petros is simply a gathering of like-minded individuals who wish to engage in prayer, Bible study, and related discussion. To prevent "peer pressure" would require the rigorous suppression of speech and discussion during occasions when Petros members interact with *other* students—in the hallways, on the playing field, at lunch. This the Constitution would plainly not countenance. The solution, instead, is for the government neither to endorse nor to suppress free expression—to adopt a policy of neutrality and pluralism, not of secularism and censorship. It was, after all, in the context of public high schools that this Court made its famous pronouncement (*Zorach* v. *Clauson*, 343 U.S. at 313): "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."

C. There Is No Other Basis For Distinguishing This Court's Decision In *Widmar* v. *Vincent*

The court of appeals cited several additional grounds for not applying the teaching of *Widmar* v. *Vincent*, *supra*, in this setting. None of these has merit.

1. *Compulsory attendance laws.* Compulsory attendance laws may necessitate some limitations on the speech and conduct of teachers and school officials that might take advantage of the "captive audience" of public school students. But they provide no basis for limiting voluntary, student-initiated speech by the students themselves. So long as the students may freely choose among a wide

range of activities and topics, there is no compulsion. Indeed, the court of appeals itself acknowledged (Pet. App. 18a):

> [T]he activity period at Williamsport Area High School provides a forum for self-expression, by which students exercise their own discretion in deciding which organization, if any, to support. Indeed, unlike compulsory instructional classes, which are created and designed by the school authorities, the very existence of such organizations depends entirely upon voluntary student participation and interest.

Students at the Williamsport High School who wish to attend meetings of Petros must affirmatively choose to do so. Thus, this case is entirely different from situations in which the school provides a captive audience for religious speech, requiring students who wish not to participate to take affirmative steps to avoid it. See *Goodwin* v. *Cross County School Dist. No. 7*, 394 F. Supp. 417, 425-427 (E.D. Ark. 1973) (violation of Establishment Clause when students permitted to read Bible verses and recite prayer to captive classroom audience); *Collins* v. *Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir.), cert. denied, 454 U.S. 863 (1981) (violation of Establishment Clause when students permitted to recite prayer at school assembly; students not wishing to attend assembly could report to study hall).

The answer to the court of appeals' argument here is no different from that supplied by this Court in a similar context in *Zorach* (343 U.S. at 311 (footnote omitted)):

> There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students [who] so request.

2. *Location of the meetings.* The court of appeals also distinguished this case from *Zorach* and *Widmar* on the ground that the meetings took place on school property in a more controlled environment than a university. Pet.

App. 25a-26a, 27a.[15] Therefore, the court concluded, "involuntary contact between nonparticipating students and religious groups is inevitable. Students of differing or conflicting creeds would therefore be less able to overlook the activities of such a group within their school, and by the same token would be more likely to perceive a message of endorsement by school authorities * * *." Pet. App. 26a, 28a.

However, the meetings of the religious group involved in *Widmar* also took place on school property, in university classrooms and in the student center (454 U.S. at 265 n.2). The Williamsport Area High School is located on a 147-acre campus and has 2,500 students—a size comparable to many smaller college campuses. More than 25 clubs have received permission to meet during the activities period (J.A. 103-104), in addition to other competing activities (homeroom, computer station, career counseling, and library), as compared to some 100 clubs in *Widmar* (not necessarily all meeting at the same time). In addition, the club in this case has agreed to forego use of school bulletin boards and other organs of publicity (a restriction not undertaken in *Widmar*). In short, there is no constitutionally significant difference between the visibility of Petros and the club involved in *Widmar* or similar clubs at other college campuses.

On this point, the court of appeals relied heavily (Pet. App. 27a-28a, 31a) on *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948), in which this Court held unconstitutional a program in which religious classes were taught on the premises of public schools by clergymen of various faiths; students who did not choose to participate could attend study hall. However, *McCollum* is distinguishable on several grounds. First, the program in *McCollum* singled out religion for special treatment,

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[15] The opinion below states that the club meetings "would be held in a classroom which, a few minutes after the meeting, is also used for regular secular classes" (Pet. App. 26a). In fact, the record shows that the club met in the school cafeteria. J.A. 53; Pet. App. 107a.

while here the students desire only rights equal to those accorded others. As this Court stated in *Widmar*, 454 U.S. at 272 n.10 (emphasis in original):

> Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. See, *e.g.*, *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

Second, as the district court observed (Pet. App. 95a), participation in the *McCollum* program was only "nominally voluntary"—like that in the school prayer cases—because students were "placed in two categories, *i.e.*, those taking religious instruction and those who were not." Here, in contrast, the religious club is only one of numerous alternative activities. The wide range of choice is a guarantee against subtle coercion. Finally, the religious program in *McCollum* was organized and operated by the school authorities, while here the club was organized and run by students themselves, totally at their own initiative. Thus, while in *McCollum* there was state sponsorship, here there is only free exercise and association.

3. *Presence of adult monitor.* The court of appeals concluded (Pet. App. 26a-27a) that the required presence of an adult monitor "necessarily must impart the impression to students that the school's authority and that the school's endorsement is implicated in the relevant activity, since every monitor must be approved by the school." However, the record makes clear that the only function of the monitor is to take attendance and to maintain order. The district court correctly concluded that "[i]nasmuch as the teacher would be present only to ensure orderly meetings, the instant situation would involve no more entanglement than when a state provides for 'the safety, security and general convenience' for persons attending the celebration of a Mass at the National Mall;

or provides police and fire protection to a church" (Pet. App. 99a-100a (footnote and citations omitted)).

4. *Excessive entanglement.* The court of appeals concluded that the club's commitment not to use the school's newspaper, bulletin boards, or public address system—a commitment not made in *Widmar*—would entail "excessive entanglement" (Pet. App. 33a-34a).[16] However, this purported distinction is based on a misunderstanding. The court of appeals apparently viewed the students' commitment as distinguishing between "religiously oriented material" and other announcements (*id.* at 33a); this would require the school officials "to interpret the posted announcements in order to distinguish religious from non-religious content" (*id.* at 34a). However, the club's commitment was to forego *all* use of the bulletin board, public address system, or newspaper to publicize their meetings—a commitment which, as Judge Adams observed (*id.* at 59a), "represents a simple, easily-administered rule" that does not require the school authorities to distinguish religious from non-religious content.

Indeed, as Judge Adams also observed, enforcing a ban against religious meetings could prove to be far more "entangling" than a policy of equal access (Pet. App. 59a). See *Walz* v. *Tax Commission*, 397 U.S. 664, 674-675 (1970) (granting tax exemptions to churches gives rise to lesser government involvement than would taxing them); *Cantwell* v. *Connecticut*, 310 U.S. at 305 (requiring official determination of what is and what is not a "religion" violates First Amendment). For example, as-

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[16] Other courts have also found that permitting student religious group meetings would involve excessive entanglement. *Lubbock Civil Liberties Union* v *Lubbock Independent School District*, 669 F.2d 1038, 1047 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983); *Brandon* v. *Board of Education*, 635 F.2d 971, 979 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981); *Johnson* v. *Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 14, 137 Cal. Rptr. 43, 50-51 (1977); see also *Nartowicz* v. *Clayton County School Dist.*, 736 F.2d 646, 649-650 (11th Cir. 1984).

sume that the students involved in Petros, or other students of a known religious orientation, were to form a Philosophy and Ethics Club. How could the school be sure that this club was not a "cover" for religious meetings? Presumably the adult monitor would have to keep a close and continuous watch over what the students said and did at each meeting to "determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove to be an 'impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" *Widmar*, 454 U.S. at 272 n.11 (citation omitted). In essence, the school would have to assume a continuing role of religious censorship over such a club's meetings—a role inimical to the values of the First Amendment.[17]

This provides further reason to believe that "benevolent neutrality" toward religion (*Walz* v. *Tax Commission*, 397 U.S. at 669) is to be preferred over a "brooding and pervasive devotion to the secular" (*Abington School District* v. *Schempp*, 374 U.S. 203, 306 (1963)

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[17] Compare the remarks of Senator Levin in support of the Equal Access Act:

> The status quo right now is that we have State officials who are making this determination as to what constitutes religious activity, what is a religion, what is a religious speech. That is not something which I am particularly happy having State officials doing, yet they are doing it right now because many attorneys representing many school boards have told the school boards, and their administrators that there cannot be a religious meeting * * *.
>
> * * * * *
>
> [S]chool officials are now being forced to make difficult decisions each time students request to meet when the subject of the meeting could be religion. For example, if a student-initiated group requests the use of school premises to talk about "moral issues," school officials would have to make further inquiries before granting the request. Will the group be discussing philosophy or theology? If the students plan to talk about religion, should the school deny the request?

130 Cong. Rec. S8354, S8355 (daily ed. June 27, 1984).

(Goldberg, J., concurring)). We suspect that the court below was so concerned that religious influences not be felt in the public high school that it simply lost sight of the wider issues of religious liberty.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1984

MICHAEL BENDER, *et al.*,

Petitioner,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF, THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, THE COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, INC., AND REPRESENTATIVE DON EDWARDS

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Interests of the Amici

The American Jewish Congress is a membership organization of American Jews founded in 1918 to protect the religious, political and civil rights of Jews and to promote the principles of democracy. It is committed to the preservation of the great freedoms secured by the First Amendment and especially the freedoms secured by its Establishment and Free Exercise clauses. It is particularly, concerned that these freedoms be protected and observed in our nation's public schools.

This brief is also submitted on behalf of the National Jewish Community Relations Advisory Council, and its following national member agencies: B'nai Brith International, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America — National Women's League for Conservative Judaism, Women's American ORT, and the 113 Community Member Agencies representing all major Jewish communities in the United States. These communities are listed in Appendix "A." As a religious minority in an overwhelmingly Christian nation, the Jewish community believes that the principle of separation of church and state is a valuable bulwark in maintaining its status as political and civil equals in American society. Most particularly, it recognizes that the existence of the non-sectarian secular public schools has enabled many Jewish children to be educated in an atmosphere for the most part free of religious bigotry, division and contention and has contributed significantly to the ability of both the Jewish community and individual Jews to enjoy the full promise of American society.

The Committee for Public Education and Religious Liberty, Inc. is a coalition of organizations, listed in Appendix B, sharing the common objectives of preserving religious freedom and the separation of church and state in public education.

As Chairman of the House Judiciary Subcommittee on Civil and Constitutional Rights, Representative Don Edwards is interested in this case for a number of reasons. The Subcommittee has jurisdiction over First Amendment issues, including free speech and religious liberty. During the last Congress, the Subcommittee conducted hearings on religious activities in public schools, including legislation to require public secondary schools to afford "equal access," within constitutional bounds, to any group of students seeking to meet on school grounds. He believes that this case will provide further guidance on the parameters of such activities.

The amici have frequently participated in litigation challenging sectarian involvement in the public schools. Because they believe that permitting religious clubs to meet in public high schools during the hours of compulsory attendance would promote an impermissible atmosphere of religious partisanship and division, wholly violative of the spirit and letter of the Establishment clause, they respectfully submit this brief with the consent of the parties.

Statement of Facts

This is an action brought by a group of public high school students challenging the right of school administrators to exclude a student prayer club from meeting in a public school classroom, under official school supervision, as part of a student activity period during mandatory school hours.

Williamsport High School has designated half-hour periods for student club activities twice each week beginning 15 minutes after the start of the official school day (J.A. 68, 107), when students are by state law under the school district's supervision (J.A. 85, 96, 102). Every student club which meets during the activity period must receive official approval from the school administration first (J.A. 64), and be supervised by an advisor who is either a faculty member (J.A. 64, 69) or a person hired by the school district to perform that function (J.A. 83, 96). All students must either attend a student club, remain in their homeroom, or go to the school library during the activity period (J.A. 102-03).

The Williamsport School District has delegated responsibility for supervision of student clubs to the high school principal (J.A. 89). Williamsport High School's policy is to allow students to suggest topics for new clubs, subject to the official approval of the school's administrators (J.A. 64, 66). The principal's policy regarding proposed new clubs is that "[a]ny student activity or club which is considered to contribute to the intellectual, physical, or social development of the students and is otherwise considered legal and constitutionally proper would likely be approved as an officially sponsored and sanctioned school activity" (J.A. 104). Thus, approval of suggested clubs is not automatic; the school retains the prerogative of rejecting clubs on a case-by-case basis, and clubs which are approved are considered to be "sponsored and sanctioned" by the school.

The selection of faculty advisors for student clubs is based on the connection between a faculty member's background and the subject matter of the club (J.A. 144). Therefore, the school attempts to provide each club with an advisor who has evinced a particular interest in the club's activities. Faculty advisors are expected to play an active role in the conduct of clubs, assisting students (J.A. 83) and keeping the administration informed of the club's activities (J.A. 76).

In September, 1981, a group of students at Williamsport High School requested permission to form a club which would meet during the student activity period to pray, read from scripture, and conduct other religious activities (J.A. 46). At the time that this request was made, approximately twenty-eight student clubs had been approved to function during the activity period.[1] None of the previously-approved clubs dealt with political, philosophical, religious, or controversial subjects (J.A. 65). All of the clubs were of the traditional, non-divisive type common to American public high schools, and are fully described in J.A. 107-141.

The high school principal allowed petitioners' group to meet once in order to allow it to determine its purpose more clearly (J.A. 74). When the group subsequently advised the principal of its desire to meet regularly during the club period for prayer and Bible reading with a faculty advisor, he refused to approve the activity, pend-

1. The active clubs sponsored by the school consisted of the Student Government, Key Club, Class Organizations (student class officers and executive board), Library Club, Business English Club, Future Homemakers of America, Vo-tech Club, Speech and Drama Club, Ecology Club, The Cherry and White (student literary magazine), Billtown Banner (student newspaper), La Memoire (student yearbook), Bank, and Choir. Past approved clubs consisted of: Archery, Art, Audubon, Aviation, Chemistry, Chess, Field, Forest and Stream, Future Nurses, Future Teachers, Bowling, German, Poetry, Photography, and Ski clubs (J.A. 103-04).

ing further advice from the district superintendent and solicitor, on the basis that such activities in the context of the school activity period might be unconstitutional (J.A. 74, 87). The students' request was referred to the superintendent, who refused to sanction the prayer club, relying upon the district solicitor's written legal opinion that the proposed activity would violate the Establishment Clause of the First Amendment (J.A. 39, 92-93).

This decision and the rationale therefor were affirmed by the Williamsport School Board upon appeal by the students, and this litigation ensued.

Summary of Argument

The Court of Appeals for the Third Circuit held that the Williamsport school authorities, by the operation of the student activity period, created a limited public forum and, therefore, petitioners had a free speech right to conduct a prayer club at the school. The Court of Appeals also held, however, that the Establishment Clause interests implicated by such a club outweighed any such free speech rights.

We agree with the Court of Appeals that a prayer club in a public school under school supervision during mandatory school hours violates the Establishment Clause. The Establishment Clause issue need not be reached, however, because the Williamsport activity period did not constitute a limited public forum and, thus, petitioners had no constitutional right to conduct their club during that activity period.[2]

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2. In the District Court, petitioners took the position that they had a Free Exercise right to conduct a prayer club during the activity period. They appear to have abandoned that argument and now base their claim solely on the Free Speech clause of the First Amendment.

ARGUMENT

I.

The School District Did Not Violate Petitioners' Free Speech Rights Because the Student Activity Period Did Not Constitute a Limited Public Forum.

A. The Public Forum Doctrine Is Essentially Incompatible With the Mission and Operation of a Public School, and No Such Forum Should Be Found to Exist Absent Compelling Evidence

The core principle of the First Amendment—that the government may not suppress or punish the expression of offensive ideas—unquestionably applies in the nation's public schools. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Petitioners' free speech claim, however, does not rest on this core principle.[3] What petitioners seek to do here is to transplant a limited branch of First Amendment jurisprudence—the public forum doctrine—into the high school setting.

This Court has never held that the public forum doctrine or a "limited" public forum doctrine applies to the edu-

3. I.e., this is not a case in which school officials punished students for the expression of offensive views (*see Tinker* v. *Des Moines Independent Community School District, supra*), or coerced students into committing acts or expressions which are inconsistent with the students' fundamental political or religious beliefs (*see West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943)), or discriminated in favor of or against personal viewpoints within already-approved subject matters (*see Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983); *Board of Education, Island Trees Union Free School District* v. *Pico*, 457 U.S. 853 (1982)).

cational program of public high schools.[4] Nor should it, for such a holding would seriously diminish the ability of local school officials to fashion the content of a school's educational program.

This Court has recognized that there are situations in which the particular use of state property is incompatible with the assumption of unlimited expression which underlies the public forum doctrine. *E.g., Greer* v. *Spock,* 424 U.S. 828 (1976). The operation of the public schools is one such situation. That is because local school districts must continue to enjoy the broad and constitutionally-protected authority this Court described in *Board of Education, Island Trees Union Free School District* v. *Pico,* 457 U.S. 853, 863-64 (1982) (plurality opinion, citations omitted):

> [L]ocal school boards have broad discretion in the management of school affairs . . . . [this Court has] . . . "repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."

The Court in *Pico* also agreed that since the public schools are

> vitally important "in the preparation of individuals for participation as citizens," and as vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system" . . . local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and . . . "there is a legitimate

4. The Court has, in fact, implied the contrary. *Perry Education Assn., supra,* 460 U.S. at 44; *Grayned* v. *City of Rockford,* 408 U.S. 104, 117-118 (1972). More generally, this Court has made clear that merely because students retain their constitutional rights while attending public school, does not mean that every subordinate principle of this Court's general constitutional jurisprudence applies in that setting. *See, e.g., New Jersey* v. *T.L.O.,* 105 S. Ct. 733 (1985).

> and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." *Pico*, 457 U.S. at 864 (plurality opinion, citations omitted).

The plain fact is that local school officials practice content-based discrimination every day, and do so without violating the First Amndment, for it is they who decide which subjects are appropriate for the educational program and which are not. Their authority to do so should not be limited to the academic aspects of the program. In order for the school to carry out its overall mission of "inculcating fundamental values," value judgments as to the content of school-sponsored activities such as clubs and plays must also be made.[5]

There are thus sound reasons which support a strong presumption that the public form doctrine should rarely be interposed into the public school setting. If a high school activity is deemed to constitute a limited public forum, the authority of school officials to prescribe the content of that activity will have been virtually eliminated. High school students, and not the officials who are supposed to run the school, would become the arbiters over the contents of the activity.

For this reason, petitioners' reliance upon *Widmar* v. *Vincent*, 454 U.S. 263 (1981), is misplaced. The mission of state universities differs profoundly from the mission of public high schools. State universities possess a central characteristic of the quintessential public forum: they are devoted to the fullest measure to free and unrestrained

5. *See, e.g., Seyfried* v. *Walton*, 668 F.2d 214 (3d Cir. 1981). Of course public school authorities do not have unfettered discretion in carrying out their function of inculcating fundamental or community values. The exercise of that discretion is limited by constitutional guarantees, such as the Establishment Clause (see Argument II, *infra*) and this Court's free speech decisions applicable in the public school setting (see note 3, *supra*).

expression and have historically operated as "the marketplace of ideas." *Healy* v. *James*, 408 U.S. 169, 180 (1972). *See Widmar, supra*, 454 U.S. at 267 n. 5; *Gay Lib* v. *University of Missouri*, 558 F.2d 848, 857 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978).[6] In *Widmar* there were over 100 recognized student clubs blanketing the spectrum of social, philosophical and political inquiry and advocacy. *See* 454 U.S. at 274. The university could not have endorsed, and could not be perceived as having endorsed, the contrariety of principles espoused by all of those clubs. The only principle it endorsed was that student speech and debate at the university should be "uninhibited, robust and wide-open." *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

In light of these distinct missions and philosophies, decisions respecting public forums at state universities cannot be transplanted into the public school setting.[7] In pressing this point, we do not suggest that a "limited public forum" can *never* exist in a public high school. Public school officials, within the narrow limits of the statutes governing them, may relinquish some of their authority over content in favor of unlimited student ex-

6. *See also, e.g., Regents of the University of California* v. *Bakke*, 438 U.S. 265, 312 (1978) (Opinion of Powell, J.); *White* v. *Davis*, 13 Cal. 3d 757, 533 P. 2d 222, 231, 120 Cal. Rptr. 94 (1975) ("the campus is the sacred ground of free discussion"); O'Neil, *God and Government at Yale: Federal Regulation of Higher Education*, 44 U.Cin.L.Rev. 525, 545 (1975) ("the climate of academic freedom at a college or university is much more than simply the aggregate of individual civil liberties").

7. The public forum issue has ramifications that go far beyond the instant case. In the instant case the Establishment Clause will prohibit religious clubs (See Argument II, *infra*), even if a limited public forum is held to have existed in Williamsport High School. There is, however, no comparable constitutional restraint to prevent a neo-Nazi club, or a KKK club, or any extremist political club. Such a judicial diminishment of the local school officials' comprehensive control over what goes on in our public schools, will disable them from carrying out their most essential functions, as described by this Court in *Pico, supra*.

pression. However, courts should not assume that school authorities have relinquished their authority. On the contrary, courts should presume that they have not done so, and should place a heavy burden of proof on those who claim otherwise. *See, e.g., Jarman* v. *Williams*, 753 F.2d 76 (8th Cir. 1985); *Seyfried* v. *Walton*, 668 F.2d 214 (3d Cir. 1981); *Buckel* v. *Prentice*, 572 F.2d 14 (6th Cir. 1978).

The Court of Appeals plainly erred in its evaluation of the public forum issue. The initial question is not whether this Court's decisions "preclude" the existence of a limited public forum in the Williamsport High School. *Bender* v. *Williamsport Area School District*, 741 F.2d 538, 548 (3d Cir. 1984). This formulation turns the issue on its head, and fails to grant local school authorities the judicial deference to which they are entitled. The Court of Appeals should have accorded a heavy presumption against the existence of a public forum and should have reviewed the record on the basis of that presumption. Had it done so, it could not have concluded that the Williamsport school authorities abandoned their right to control the content of clubs operating during the student activity period.

B. Petitioners Did Not Meet Their Burden of Demonstrating the Presence of an Open Forum for Student Self-Expression

The Court of Appeals rested its limited public forum holding in part on the fact that the clubs were not part of the school's "formal curriculum." *Bender, supra*, 741 F.2d at 549. By thus limiting "curriculum" to specific instructional subjects, the Court erroneously defined it in an overly limited and mechanistic manner. If that definition is affirmed by this Court, it will require school officials throughout the country to make the choice between eliminating all school programs not directly related to specific instructional

subjects, or relinquishing to students the right to determine the content of such programs.

The Court of Appeals failed to give recognition to the fact that when school officials sponsor programs outside the classroom they do not intend to create thereby a wide-open "free time" period over which they no longer exercise control. As noted above, their authority extends beyond the purely academic, informational, aspect of their programs and encompasses as well the socializing function. *Pico,* 457 U.S. at 864. Moreover, in this case the activity period was structurally imbedded within the educational program at Williamsport High School;[8] it was not a mere adjunct thereto.

The Court of Appeals also critically erred in assuming that since no club other than Petros had ever been rejected by the school, the school officials must have abandoned all control over the substance of the activity period, delegated their authority to students, and created an open "forum for self-expression." *Bender, supra,* 741 F.2d at 548. This assumption is not supported by any finding of fact, and is refuted by the record.

The clubs which previously had been approved did not comprise a wide-open forum for unlimited student discussion. Each was tied to instructional subjects or advanced mental or physical skills, or performed public or school services. Each was of the traditional, non-divisive and non-controversial sort that one finds in public schools all over the country. Unlike *Widmar,* the Williamsport High School had no political, philosophical or religious clubs.

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8. The school district determined that the period should take place during mandatory hours, in regular classrooms, and under the active supervision of teachers. The school required that attendance be taken at club meetings, and reserved the right to approve the subject matter of clubs as they were proposed. Teacher-monitors were required to report any improper conduct which occurred during the club period. (J.A. 64, 69, 76, 83).

The Williamsport school officials reserved the right to reject any proposed student club.[9] Had the school officials specified in advance permissible club subjects, it could not be argued that an open-ended forum was either intended or created. Yet there is no real distinction between such a policy and the Williamsport school district's approach of allowing students to suggest topics subject to school approval. That the district permitted students this initiative does not suggest in the least that it intended to surrender its discretion to reject any club it deemed inappropriate. To take but one obvious example, had a student group proposed an extremist political club, nothing in this record suggests that Mr. Newton would have approved that club. The fact that Mr. Newton had actually not rejected any club proves only that no controversial club had yet been suggested.

The facts therefore are as follows: the approval of school officials was required, they had granted that approval to a number of traditional and non-controversial clubs, and they retained the right to reject clubs they determined to be inappropriate. There is no specific finding of fact by the lower court to the contrary. This aspect of the case is therefore governed by *Perry Education Assn., supra,* which presented almost identical facts. In *Perry,* the school officials had permitted a certified union and a variety of public interest groups to use the school's internal mail system. No group had been denied access before a rival union submitted its request to use the facility. When the rival union was denied such permission, it claimed that the school's access

9. According to Principal Newton, "any student activity or club which is considered to contribute to the intellectual, physical or social developments of the students and is otherwise considered legal and constitutionally proper *would likely* be approved *as an officially sponsored and sanctioned school activity.*" (J.A. 104, emphasis added). This careful statement does not reflect an abdication of authority. Instead, Mr. Newton clearly retained the right to veto proposed clubs which he thought inappropriate "as an officially sponsored and sanctioned school activity."

policy regarding the mail system had created a limited public forum. The Court rejected this claim, relying upon certain factual characteristics shared by the activity period here:

> [T]here is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations . . . to use the facilities. *This type of selective access does not transform government property into a public forum.* 460 U.S. at 47 (emphasis supplied).

Finally, the Court of Appeals observed that a few of the student clubs discussed subjects not apparently related to the school's formal instructional subjects. The Court cited the Key Club (a public service club), the Chess Club, the Aviation Club and the Office Aides as examples of "non-curricular" student groups which had been approved. At the same time, however, the Court correctly observed that these clubs could be considered "curricular" in the sense that they furthered the achievement of the school's overall mission.

The relationship between the existing clubs and the instructional subjects is of little, if any, constitutional significance. School officials must be able to promote some clubs not specifically related to instructional subjects, without becoming subject to a constitutional rule that they must grant access to *every* club. Many high schools do not have formal classes in music appreciation, for example. If school officials in one of those high schools endorsed a student-proposed music club, it cannot be that they would there-

upon be required to accept student-proposed political and religious clubs.

The Court of Appeals' mistake was to create a category of student clubs—those not tied to the formal instructional curriculum—and then to conclude that because some clubs within that category had been approved, all clubs within that category must be accepted. This reasoning is contrary to this Court's decisions. *Perry, supra; Greer* v. *Spock,* 424 U.S. 828 (1976). In *Greer* it was argued that because the government had allowed civilians to speak on military bases, all civilians must be granted access, including those who intended to give political speeches. The Court held that it was proper for the government to distinguish among civilians who sought access because political orators presented problems that non-political speakers did not. The touchstone issue in both *Greer* and *Perry* was whether government officials regulating access had legitimate reasons for drawing the distinctions they drew. That is the remaining issue here.

C. The Williamsport School Authorities Had Legitimate Reasons to Refuse to Sanction a Religious Club

The Williamsport school officials had legitimate reasons for concluding that a religious club presents serious problems that are not created by groups like the Key Club, the Chess Club, the Aviation Club and the Office Aides. In a selective forum, in which all approved clubs represent "officially sponsored and sanctioned school activity," school officials understand that official sponsorship of organized religious prayer is quite different from, say, official sponsorship of competition in chess.

School officials also understand the special problems a religious club can present in respect of the appropriate function of the teacher. According to the school district's

policy, each club must be supervised by a faculty advisor or other professional employee of the district (J.A. 64, 83, 96), the advisor for each club is selected "based upon the nature of the particular club and corresponding background of the faculty member" (J.A. 144), and the advisor is to actively assist the students in achieving the objectives of the club (J.A. 83). These policies can be carried out easily with a group like the Chess Club; they cannot be followed in a prayer club without blatantly violating the Establishment Clause. The school district would practice unconstitutional religious discrimination if it selected the faculty advisor for a prayer club based on his or her "corresponding background." And the school district would violate the principles laid down in *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), were a faculty advisor to actively assist students in a prayer ceremony. (*See* Sec. II, *infra*)

School officials also understand the dangers that would be presented if students in a religious club were allowed to publicize their activities through the channels of communications regularly used by all other approved clubs (e.g., the public address system, bulletin boards, and the school yearbook). When used by the Chess Club, these announcements are innocuous. When used by a religious club, they create real dangers of divisiveness and proselytization.

Given these three factors which inhered in approval of a religious club—official endorsement, the role of faculty advisers, and the use of school facilities for publicizing—the Williamsport school officials were concerned that the inclusion of a religious club in the activity period would violate the Establishment Clause. This is a legitimate reason to refuse to sanction a religious club.

Petitioners claim that the school officials are mistaken in their concern about appearing to officially endorse re-

ligious beliefs. We agree with the school authorities on this matter, but whether they were right or wrong is not the issue. In *Greer* v. *Spock*, *supra*, civilian political groups were banned from military bases because their presence was seen by the government as potentially creating the appearance of partisan political influence over the military. The government may have been wrong in this view, but it represented a good faith judgment which the government had the right to make. Similarly, there are ample grounds to support the Williamsport school district's judgment that adding a religious club to an activity period which to that point had not included any controversial clubs whatever, would be viewed as an official endorsement of religion.[10]

Petitioners' response to the other two factors (the role of faculty advisors and the use of school communications facilities) is equally unpersuasive. They apparently agree that if the faculty advisor for a prayer club is selected and acts according to existing school policy, an Establishment Clause violation will result, and understand the problems that would be created if a prayer club advertised through school facilities. They are therefore willing to forego these privileges; they will accept a faculty advisor who acts purely as a passive monitor and they will agree to be prohibited from advertising through school facilities.

The constitutional issue here is whether petitioners have a right of access to the forum *as it exists and as it is operated*. Petitioners have no right to insist that the forum be modified to suit their needs and wishes. In particular, local school authorities may legitimately set policies concerning the selection and role of faculty mem-

10. This is not like *Widmar*, where the university's expressed fear of official endorsement had to be examined in light of the presence of clubs like Students for a Democratic Society and Young Socialist Alliance. *Widmar*, *supra*, 454 U.S. at 274.

bers who supervise student clubs. The school authorities are not required by the Constitution to negotiate modifications of these policies with every student group that wants to form a club.

The question before the Court with respect to the Establishment Clause is whether the prayer club *must* be excluded from the activity period; the question with respect to the public forum issue is whether the prayer club *may* be excluded. If school officials themselves determine that approval of a religious club on school premises would at the very least create a danger of, or give the appearance of, breaching the constitutional separation of church and state, that conclusion is a valid basis for denial of approval. School officials are entitled to make good faith judgments, even if they are in error, about what school programs are illegal and should therefore be prohibited. It is also within their discretion to steer clear of programs which might be illegal, or which verge on the edge of illegality. School officials need not wait to see whether it is possible to have such a club without running afoul of the Establishment Clause. They have the right to decide that it is best not to take the first step in that direction. The role of the judiciary in such circumstances is to decide whether such judgments are made as a pretext to suppress unpopular ideas;[11] it is not to act as an appeal tribunal in order to *de novo* consider whether the school principal or school board was correct in its judgment.

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11. There is no suggestion that the Williamsport school officials denied approval of the prayer club for such reasons.

II.

The Establishment Clause of the First Amendment Prohibits School Officials from Including a Religious Club Among Approved Student Clubs in Which Students Participate During Mandatory School Hours, on School Premises, and Under School Supervision.

The petitioners in this case share the same objective as their predecessors in prior school prayer cases: to introduce organized religious practices into the public schools. The petitioners have attempted to achieve this objective in a novel manner by framing the issue as one implicating the free speech rights of high school students.

As argued in the first section of this brief, petitioners have no such free speech rights to a prayer club on public school premises. If, however, the Court finds that the public forum doctrine is applicable to the public schools, and that Williamsport High School created such a forum, the Establishment Clause interests must nevertheless prevail over such free speech rights.

Once again this Court confronts an effort by citizens to have the public school system sanction prayer and religious practices as appropriate school activities. In prior cases, *e.g.*, *Wallace* v. *Jaffree*, 53 U.S.L.W. 4665 (U.S. June 4, 1985); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038 (5th Cir.), *cert. denied*, 459 U.S. 1155 (1983); *cf. Stone* v. *Graham*, 449 U.S. 1104 (1981), citizens convinced legislatures or school boards to provide a time for prayer through a statute or policy. In this case, citizens have sought school official approval for prayer meetings initiated by groups of students on

school premises during regular school hours as part of a regular student activity period.[12]

The religious activity at issue here presents precisely those dangers the first Amendment seeks to avoid and this Court's prior decisions prohibit: potential divisiveness along religious lines;[13] the appearance of a governmental imprimatur on religious practices in general, or certain religions in particular; potential religious pressures on youth of impressionable age; substantial risk of proselytization in public schools with the appearance of official approval; and inevitable entanglement of government and religion. Although couched in a different format, this case presents long-standing and well-recognized dangers.

A. This Court's Precedents Proscribe Group Prayer in the Public Schools Undertaken with the Approval and Participation of School District Personnel

This Court has never applied the "religious speech" characterization to group prayer or religious instruction in a public high school. Indeed, the Establishment Clause dangers in that context have been so apparent that the Court has not felt the need to balance potential free speech issues in cases such as *Engel* v. *Vitale, supra; Illinois ex*

12. Congress has attempted to require local school districts to allow prayer clubs. Federal Equal Access Act, 20 U.S.C. § 4071 *et seq.* For the reasons stated herein, that Act is likewise a violation of the Establishment Clause.

13. Petros purports to be non-denominational. In fact, it is Christian, as evidenced by its very name. In any event, non-denominational does not mean non-sectarian, which is the issue of constitutional significance. *Wallace* v. *Jaffree, supra.*

Religious clubs inevitably will divide along religious lines. Religion is, after all, by its nature exclusionary unless outsiders choose to convert. Thus, the public school, the institution designed to harmonize Americans of all creeds, will become instead a forum for religious divisiveness.

rel. McCollum v. *Board of Education*, 333 U.S. 203 (1948); *Abington School District* v. *Schempp*, *supra*; *Wallace* v. *Jaffree*, *supra*. The reasons it has not done so are addressed later in this brief. Here it need only be emphasized that, in the context of public school practices, this Court has invariably subordinated such issues to Establishment Clause concerns. In order to ensure that our public schools remain a unifying force rather than a forum for sectarian competition, this Court has struck down every attempt to introduce organized prayer or religious instruction in the schools.

In *Illinois ex rel. McCollum* v. *Board of Education*, *supra*, the Court held that school officials violated the Establishment Clause by permitting religious classes to be conducted on school premises, even though these classes were initiated and controlled by non-governmental authorities and participation was voluntary. The Court held that public school premises are not to be used for religious activity or instruction.

The *McCollum* principle was confirmed in *Zorach* v. *Clausen*, 343 U.S. 306 (1952), where the Court upheld a released time program under which public school students were dismissed from school early so they could attend off-school ground religious instruction. The change in situs was critical for the Court. *Id.*, 343 U.S. at 308-09. Here the Prayer Club proposes to meet "on school premises" (J.A. 46) during the hours of compulsory attendance, thus seeking to do what *McCollum* found to be constitutionally unacceptable.

In *Engel* v. *Vitale*, *supra*, 370 U.S. at 430, the Court banned the recitation of a nondenominational prayer at the start of the school day, notwithstanding that students who did not wish to participate could be excused from doing so. Petitioners' assertion here that their activities

will be nondenominational and voluntary is thus of no constitutional significance, even if it were true. *See also Abington School District* v. *Schempp, supra.* These principles were most recently affirmed in *Wallace* v. *Jaffree, supra.*

The unifying theme of these decisions is the proscription in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), that "a state [cannot] . . . participate in the affairs of any religious organizations or groups." *Id.* at 16. Yet Petros seeks to be "approved" by the school district, a status which carries with it the appointment of a faculty advisor to advise, assist and report on the group's activities (J.A. 76, 83). Such "active involvement of the sovereign in religious activity," is one of the evils which the Establishment Clause was designed to eradicate. *Pearl* v. *Nyquist*, 413 U.S. 756, 772 (1973), *quoting Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970).

What petitioners seek—state approval to meet during an officially scheduled club hour—is what this Court's decisions hold they cannot have. It need hardly be added that the foregoing decisions in no way evidenced hostility to religion. It is the very prominence and importance of religion in American life that counsels vigilance against "the myriad, subtle ways in which Establishment Clause values can be eroded." *Lynch* v. *Donnelly*, 465 U.S. ——, ——, 104 S.Ct. 1355, 1370 (1984) (O'Connor, J., concurring).

The principles most applicable to the instant case were stated by Mr. Justice Frankfurter in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 216-217 (1948):

> The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from

> pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcible pressures by religious groups, of religion from censorship and coercion however soberly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

Religious clubs in school threaten to turn the clock back to a period in our nation's history when public schools were the scene and source of sectarian divisiveness. Pfeffer, *Church, State and Freedom*, 321-61 (1967). While the intensity of the religious struggle over the public schools has been lessened by this Court's decisions, persistent efforts to evade this Court's precedents by seeking state approval for organized religious practices in public schools prove the need for continuing judicial vigilance. In this sensitive area, care must be taken because "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . ."[14]

B. The Prayer Club Proposed in This Case Violates the Establishment Clause Under the Tripartite Test Announced in *Lemon v. Kurtzman*

Although this Court's prior decisions are dispositive of this case, the same result is required by application of the

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14. Remarks of Representative Daniel Carroll in the House of Representatives Debate on what was to become the First Amendment. Quoted from A. Stokes & L. Pfeffer, *Church and State in the United States*, 94 (1964).

tripartite test first enunciated as such in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971), and restated and applied most recently in *Wallace* v. *Jaffree, supra*. To conform to the Establishment Clause, a practice must have a secular purpose, a primary effect which neither advances nor inhibits religion, and must not excessively entangle government with religion. As the Court of Appeals correctly noted, if *any* of these three standards are violated, the practice violates the Establishment Clause. *Bender, supra* 741 F.2d at 550-51.

1. *Purpose*

In the context of this case, in which the school district seeks to prohibit rather than to allow a religious activity, there is no need for the Court to reach the question of the school district's purpose.[15]

2. *The Primary Effect of Allowing a Prayer Club to Meet in Classrooms During School Hours Under Faculty Supervision Will be to Advance Religion*

There is no doubt that petitioner Morris Braggs was talking about a purely religious activity when he wrote to the school sperintendent "[o]n behalf of the Prayer Club . . . concerning the establishment of a prayer meeting at Williamsport Area High School." (J.A.-41). To facilitate their group worship, he sought the superintendent's approval, and he sought to utilize both the compulsory attendance machinery of state law and the school district's building. As this Court noted in *Lynch* v. *Donnelly*, that is precisely what was prohibited in *McCollum*:

15. While the School District's purpose is not at issue here, such would not be the case in an action brought with respect to the Federal Equal Access Act, 20 U.S.C. § 4071 *et seq*. The legislative history of the Equal Access Act reveals the intent to formulate a statute which would restore prayer activities to the public schools. *Cf. Wallace* v. *Jaffree, supra*.

> "the State had not only used the public school buildings for the teaching of religion, it had 'afford[ed] sectarian groups an invaluable aid . . . [by] provid-[ing] pupils for their religious classes through use of the State's compulsory public school machinery.' "

Lynch v. *Donnelly*, *supra*, 465 U.S. at ——, 104 S.Ct. at 1364 (1984).

A governmental practice whose primary effect so obviously advances religion is unconstitutional, even if the government's purpose is neutral. *Lemon* v. *Kurtzman*, *supra*. An otherwise secular setting does not suffice to justify a practice that has the primary effect of aiding religion. As this Court noted in *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973), "[a]id normally may be thought to have a primary effect of advancing religion . . . when it [supports] a specifically religious activity in an otherwise substantially secular setting." Such is the case here.

The practice urged by petitioners advances religion also because it would be perceived as governmental endorsement of the religion practiced in the club. The public schoolroom is the first opportunity most citizens have to experience the power of government. Because of our compulsory attendance laws, the public school building has become a symbol of government authority, and the teacher has become the embodiment of that authority. The typical school day is carefully structured and controlled. Student activities are closely supervised, and inappropriate conduct is subject to punishment. The implication for students is obvious: conduct which is permitted to take place during the organized school day generally enjoys the approval and support of the school administration. See *Engel* v. *Vitale*, *supra*, 370 U.S. at 431; *Wallace* v. *Jaffree*, *supra*, at n. 51.

Oliver Wendell Holmes once observed, "[w]e live by symbols, and what shall be symbolized by any image of

the sight depends upon the mind of him who sees it." *Collected Legal Papers,* 270 (1920). Holmes' wisdom must be kept in mind when evaluating whether a particular practice is likely to carry with it an implied governmental endorsement of religion, for the answer may well depend upon whether the observer is a member of the majority culture and religion and thus less sensitive to the harms likely to be experienced by the minority.

To be a member of the minority community means to know instinctively the truth recorded by William Aylott Orton:

> Communities of all types, as they have become organized and self conscious, have a tendency also to become closed. The "I belong" tends increasingly to imply "you don't." Consciousness of kind increasingly becomes consciousness of difference. And consciousness of difference tends . . . to be translated in terms of superior and inferior.

The Liberal Tradition: A Study of the Social and Spiritual Conditions of Freedom 19 (1945). If the Establishment Clause is to serve, among other purposes, as a prophylactic device to protect the interest of the minority, it must exert its influence long before most members of the majority recognize the existence of any concrete harm.

Moreover, the practice urged by petitioners advances religion also because of the coercive pressures which inhere in it.[16] Many students do, and should, view teachers as role models and may attend meetings of Petros simply because of their admiration for, or wish to curry favor with, the particular teacher who serves as advisor. Involvement in the club by respected students would like-

16. Those who differ with the majority in matters of conscience are often shunned or singled-out as the special targets of hate. *See,* Note, *Released Time Considered: The New York Plan Is Tested,* 61 Yale L.J., 405, 415 n.54 (1952).

wise increase pressures on others to join. As the Second Circuit observed in *Brandon* v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). "An adolescent may perceive 'voluntary' prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the 'captive audience' setting of a school." 635 F.2d at 978 (citation omitted). In short, the natural pressures inherent in the closed, compulsory high school setting would inevitably operate to assist the functioning of a religious club. *Wallace* v. *Jaffree*, *supra*, at n.51.

On this issue too, as they do on the public forum issue, petitioners rely on *Widmar* v. *Vincent*, *supra*. Once again that reliance is misplaced.

The Court in *Widmar*, as it has in other cases,[17] took pains to stress that the case involved college students who "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." 454 U.S. at 274, n.14. Both the Second and Fifth Circuits have held in similar situations that this "impressionability" mandated that there may not be official approval of religious clubs. *Brandon* v. *Board of Education*, *supra* at 978; *Lubbock Civil Liber-*

17. *See, e.g., Lemon* v. *Kurtzman*, 403 U.S. at 616; *Tilton* v. *Richardson*, 403 U.S. 672, 686 (1970); *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 297-99 (Brennan, J., concurring). *Cf. Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983) (distinguishing between adults not susceptible to "religious introduction" and children subject to "peer pressure").

Most recently, in her concurring opinion in *Wallace* v. *Jaffree*, *supra*, Justice O'Connor noted that "[t]his Court's decisions have recognized a distinction when government sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs." 53 U.S.L.W. at 4677.

ties Union v. *Lubbock Independent School District*, 669 F.2d 1038, 1045 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

Widmar involved college students, for many of whom the campus constitutes home and community. Their day is not spent under the continuous, watchful eye of a school employee. Clear distinctions do not exist to divide school time from non-school time. The range of permissible activity is great, and behavior is subject to neither constant regulation nor affirmative supervision by university authorities. But under state compulsory education laws high school students are legally required to spend a certain portion of their day at school, where their day is carefully structured and controlled (*see* J.A. 105), and their activities closely supervised by teachers with whom they develop special relations. *New Jersey* v. *T.L.O.*, *supra*, 105 S.Ct. 733 at 747 (1985) (Powell, J., concurring).

Moreover, as we argued above, in *Widmar*, a broad spectrum of other permitted activities—such as political clubs of very diverse views—dispelled any inference of university endorsement. Here, where all clubs were either directly related to an academic subject or performed civic services to the school and community, school endorsement is the only logical inference.

Thus, because universities and public schools have student bodies of different levels of impressionability, operate so differently, and have such different missions, a prayer club would not be perceived by university students as governmentally sponsored, whereas it would be so perceived by high school students. That inference is reinforced where school policy requires that a faculty advisor be present and that presence would be interpreted by impressionable students as indicative of school sponsorship. By contrast, in *Widmar*, the religious club was left to

meet on its own without the presence of teachers or other university representatives.

It offends common sense to suggest, as petitioners do, that endorsement by the school would not be presumed.[18]

3. *Allowing Petros to Meet Would Excessively Entangle the School District in Religious Practices*

The Establishment Clause prohibits government involvement with religion where "continuing state surveillance will inevitably be required to ensure that [the] restrictions [of] . . . the First Amendment [are] respected." *Lemon* v. *Kurtzman*, 403 U.S. at 619.

As discussed above, school policy requires that a teacher be assigned as an advisor to each student club. School District officials further testified that state law requires all students to be supervised by a professional employee all day.

This Court in *Widmar, supra*, 454 U.S. at 272 n.11, noted that constant surveillance to ensure a club's non-sectarian nature, involves greater entanglement than would a rule simply permitting such a club to function on its own. Yet in the instant case, unlike in *Widmar*, state law and school policy combine to require precisely such monitoring of religious clubs, and much more: supervision (J.A. 64, 69), an active role in assisting students (J.A. 83), and inform-

18. If instead of a Prayer Club these students had organized a "Playboy Club" is there any doubt that parents would immediately complain about the school district's approval and endorsement of such a club? If such a reaction is to be expected of parents, can one realistically expect students to be able to distinguish between neutrality and endorsement in a public school context? Moreover, perhaps the students presently at Williamsport High School, knowing the origins of the Prayer Club, know that it was student-initiated. A few years from now, however, entering students will only know that the school offers a range of clubs, including a Prayer Club.

ing the administration of the club's activities (J.A. 86). Moreover, the school attempts to provide a teacher advisor who evinces a particular interest in the club's activities (J.A. 144). In this case, as in *Lemon*, "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state." 403 U.S. at 620-21.[19]

The students involved in Petros recognized the inherent entanglement problem. They sought to limit its extent by foregoing the use of the school's bulletin boards and public address system to publicize their activities. But as the Court of Appeals observed, this arrangement itself would require surveillance by school officials to ensure compliance. In short, the institutional realities at work in a public high school setting—the "captive audience" created by compulsory attendance, mandatory teacher supervision, and inevitable teacher involvement in student matters—all serve to differentiate this case from *Widmar*, and would lead inevitably to the kind of active participation in religious matters prohibited by the excess entanglement test.

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19. For example, what if members of the Prayer Club differed as to what prayers should be recited, or which version of the Bible should be used? The faculty monitor would inevitably, and inappropriately be drawn into such conflicts.

III.

Conclusion

No public forum was created by Williamsport school officials. Thus, there is no free speech right present in this case. Even if there were, the Establishment Clause interests outweigh any free speech interests in the public school context. The judgment of the Court of Appeals should, therefore, be affirmed.

Respectfully submitted,

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APPENDIX A

Community Member Agencies of The National Jewish Community Relations Advisory Council

Birmingham Jewish Community Council

Greater Phoenix Jewish Federation

Tucson Anti-Defamation—Community Relations Committee of the Jewish Community Council

Greater Long Beach and West Orange County Jewish Community Federation

Los Angeles Community Relations Committee of Jewish Federation-Council

Oakland Greater East Bay Jewish Community Relations Council

Orange County Jewish Federation

Sacramento Jewish Community Relations Council

San Diego Community Relations Committee of United Jewish Federation

San Francisco Jewish Community Relations Council

Greater San Jose Jewish Community Relations Council

Greater Bridgeport Jewish Federation

Greater Danbury Community Relations Committee of Jewish Federation

Greater Hartford Community Relations Committee of Jewish Federation

New Haven Jewish Federation

Eastern Connecticut Jewish Federation

Greater Norwalk Jewish Federation

Appendix A

Stamford United Jewish Federation

Waterbury Jewish Federation

Jewish Community Relations Council of Connecticut

Wilmington Jewish Federation of Delaware

Greater Washington Jewish Community Council

South Broward Jewish Federation

Greater Fort Lauderdale Jewish Federation

Jacksonville Jewish Community Council

Greater Miami Jewish Federation

Greater Orlando Jewish Federation

Palm Beach County Jewish Federation

Pinellas County Jewish Federation

Sarasota Jewish Federation

Atlanta Jewish Federation

Savannah Jewish Council

Metropolitan Chicago Public Affairs Committee of Jewish United Fund

Peoria Jewish Federation

Springfield Jewish Federation

Indianapolis Jewish Community Relations Council

South Bend Jewish Federation of St. Joseph Valley

Jewish Community Relations Council of Indiana

Greater Des Moines Jewish Federation

Louisville Jewish Community Federation

Greater New Orleans Jewish Federation

Appendix A

Shreveport Jewish Federation

Portland Southern Maine Jewish Federation—
Community Council

Baltimore Jewish Community Relations Council

Metropolitan Boston Jewish Community Council

Marblehead North Shore Jewish Federation

Greater New Bedford Jewish Federation

Springfield Jewish Federation

Worcester Jewish Federation

Metropolitan Detroit Jewish Community Council

Flint Jewish Federation

Minneapolis, Minnesota and Dakotas Jewish Comumnity
Relations Council—Anti-Defamation League

Greater Kansas City Jewish Community Relations Bureau

St. Louis Jewish Community Relations Council

Omaha Jewish Community Relations Committee
of Jewish Federation

Atlantic County Federation of Jewish Agencies

Bergen County Jewish Community Relations Council
of United Jewish Community

Cherry Hill Jewish Community Relations Council of
Southern New Jersey Jewish Federation

Delaware Valley Jewish Federation

East Orange Metropolitan New Jersey Jewish
Community Federation

Northern Middlesex County Jewish Federation

Appendix A'

Raritan Valley Jewish Federation

Union Central New Jersey Jewish Federation

Wayne North Jersey Jewish Federation

Albuquerque Jewish Community Council

Greater Albany Jewish Federation

Binghamton Jewish Federation of Broom County

Brooklyn Jewish Community Council

Greater Buffalo Jewish Federation

Elmira Community Relations Committee of Jewish Welfare Fund

Greater Kingston Jewish Federation

New York Jewish Community Relations Council

Pittsburgh Community Relations Committee of United Jewish Federation

Scranton-Lackawanna Jewish Council

Greater Wilkes-Barre Jewish Federation

Provindence Community Relations Committee of Rhode Island Jewish Federation

Charleston Jewish Community Relations Committee

Columbia Community Relations Committee of Jewish Welfare Federation

Memphis Jewish Community Relations Council

Nashville and Middle Tennessee Jewish Federation

Austin Jewish Community Council

Greater Dallas Jewish Community Relations Council of Jewish Federation

Appendix A

El Paso Jewish Community Relations Committee

Greater Houston Jewish Federation

Fort Worth Jewish Federation

San Antonio Jewish Community Relations Council of Jewish Federation

Newport News-Hampton Jewish Federation

Richmond Jewish Community Federation

Tidewater United Jewish Federation

Greater Seattle Jewish Federation

Madison Jewish Community Council

Milwaukee Jewish Council

Central Kentucky Jewish Association

South County (Florida) Jewish Federation

APPENDIX B

Members of the Committee for Public Education and Religious Liberty, Inc.

American Ethical Union

Americans for Democratic Action

American Jewish Committee, New York Chapter

American Jewish Congress

A. Philip Randolph Institute

Aspira

Association of Reform Rabbis of New York City and Vicinity

B'nai B'rith

Citizens Union of the City of New York

City Club of New York

Community Church of New York

Community Service Society, Department of Public Affairs

Council of Churches of the City of New York

Council of Supervisors and Administrators

Episcopal Diocese of L.I., Department of Christian Social Relations

Humanist Society of Greater New York

Jewish War Veterans, New York Department

League for Industrial Democracy, New York City Chapter

National Council of Jewish Women

Appendix B

National Women's Conference of
The American Ethical Union

New York Civil Liberties Union

New York Federation of Reform Synagogues

New York Jewish Labor Committee

New York Metropolitan Chapter, Americans United for
Separation of Church and State

New York Society for Ethical Culture

New York State Americans United for
Separation of Church & State

New York State Congress of Parents and Teachers

New York State Council of Churches

New York Women's Conference of the Society for
Ethical Culture

Public Education Association

Union of American Hebrew Congregations,
New York State Council

Unitarian-Universalist Ministers Association of
Metropolitan New York

United Americans for Public Schools

United Community Centers

United Federation of Teachers

United Parents Associations

United Synagogue of America,
New York Metropolitan Region

Women's City Club of New York

Workmen's Circle, New York Division

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS

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BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS

INTEREST OF AMICUS CURIAE

The American Association of School Administrators ("AASA") is the national professional organization for local school district administrators and other educators in our nation's public schools. AASA's members include nearly 18,000 school district superintendents, other school district administrators, school principals and other building level administrators, and educational administrators from other local, regional, state, and national educational agencies.

The resolution of this case, particularly in light of its possible ramifications concerning the constitutionality of the Equal Access Act, Pub. L. No. 98-377 (1984), is a matter of vital concern to AASA and its members. The Court of Appeals properly held that a local school district was not required to include a prayer club in its extracurricular activity program. If this decision is reversed, either directly by a decision of this Court or effectively through continued implementation of the Equal Access Act, it will be AASA's members who will shoulder the front-line responsibility for implementing the results.

Those results, AASA is convinced, could be disastrous for extracurricular programs in public secondary schools and seriously damaging to public education in America. Properly supervised extracurricular activities form an important part of the overall educational function of junior and senior high schools across the United States. The level of official involvement necessary by school personnel to supervise religious groups adequately in a secondary school setting, along with the message of official approval which would be conveyed, would render the results sought by petitioners violative of the Establishment Clause of the First Amendment. Even apart from the constitutional issues, however, mandating the inclusion of religious activities within school districts' extracurricular programs would require constant monitoring to ensure that such activities are voluntary and student-initiated, would engender significant school and community strife, would interfere with the proper conduct of extracurricular programs, and would lead many school districts to eliminate altogether many valuable extracurricular activities. AASA thus urges this Court to affirm the decision of the Court of Appeals in this case.[1]

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[1] This brief is submitted by AASA pursuant to the unanimous vote of its Executive Committee and with the written consent of the parties, copies of which have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

Unlike the situation in colleges and universities, which often provide open forums for student activities with little or no control or guidance by administrators, extracurricular student activities in junior high and high schools throughout the United States are part of the schools' educational program and are subject to careful faculty and administrative supervision. Educators consider such activities an important part of the educational and growth process for adolescents. Supervision of such activities is essential, however, both because of the educational value of supervision itself and because of the age and impressionability of secondary school students, who may be as young as 11 or 12 in some states.

In this context, mandating that secondary schools include religious activities within their extracurricular program would violate important principles of constitutional law and educational practice. Students would be likely to perceive a message of state endorsement of such religious activities. Continuing state surveillance would be required to ensure that First Amendment restrictions are respected, and continuing relationships between school officials and religious groups would develop. The decisions of this Court make it clear that these results violate the Establishment Clause of the First Amendment. *See Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

Educationally, such required inclusion of religious activities, particularly when coupled with the other restrictions imposed by the Equal Access Act, would threaten the important role of extracurricular programs in American secondary schools. Schools would be required to spend considerable time and effort in policing religious groups to ensure that they are voluntary and student initiated. Instead of providing helpful guidance to students, school staff would become monitors who, under the

Equal Access Act, could not participate in activities. Despite school efforts, school disruption and community strife would undermine the schools' educational program, as has already occurred in a number of communities as a result of the Equal Access Act. Many schools would probably eliminate valuable extracurricular programs altogether to avoid such problems, as several have already done. AASA submits that these consequences must be avoided. The decision below should be affirmed.

ARGUMENT

I. Properly Supervised Extracurricular Student Activities Are An Integral Part of the Educational Program in American Secondary Schools

This Court has previously recognized the important role of public elementary and secondary schools. Middle schools, junior high schools, and high schools, which educate students as young as 11 or 12 in some states, are not "marketplace[s] of ideas" or forums for "campus debate" as are colleges and universities. *Healy* v. *James*, 408 U.S. 169, 180, 181-82 (1972). Instead, secondary schools rely on structured programs for imparting knowledge and "inculcating fundamental values necessary to the maintenance of a democratic political system." *Board of Education* v. *Pico*, 457 U.S. 853, 864 (1982) (Brennan, J., for the plurality).[2]

At the secondary school level, therefore, extracurricular activities are not quasi-independent functions which happen to occur at a school forum and with which the school is not "identified in any way," as on a college campus. *Widmar* v. *Vincent*, 454 U.S. 263, 274 n.14 (1981). On the contrary, extracurricular activities in secondary schools are carefully supervised by faculty

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[2] *Accord id.* at 876 (Blackmun, J., concurring); *id.* at 889 (Burger, C.J., dissenting); *id.* at 896 (Powell, J., dissenting); *id.* at 913-14 (Rehnquist, J., dissenting); *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982).

and administrators, promote important educational objectives, and are "integral parts of the school program." [3]

Various types of activities may be included in a secondary school's extracurricular program. Some, such as mathematics clubs and school bands, grow out of or are related directly to aspects of the school's regular classroom curriculum. Others, such as Junior Achievement clubs, hiking clubs, chess clubs, and key clubs or other community service organizations, may not be curriculum-related. In either event, however, strong educational evidence indicates that secondary school extracurricular programs can help achieve important educational benefits for adolescents, such as developing responsibility, leadership and social skills, increasing student motivation and self-esteem, promoting positive extra-class relationships, and helping inculcate community values.[4] One educator

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[3] F. Gruber & T. Beatty, *Secondary School Activities* 13 (1954) (hereinafter "Gruber"). *Accord* J. Yarworth & W. Gauthier, Jr., *Relationship of Student Self-Concept and Selected Personal Variables to Participation in School Activities*, 70 J. Educ. Psychology 335 (1978) (hereinafter "Yarworth") (explaining that "American schools have stressed extra- and co-curricular activities as an integral part of the school program"). Indeed, educators have debated the question of whether such activities should be called "extracurricular" at all, or whether other terms should be used which make it clear that such activities "are an important part of the educational program." R. Frederick, *The Third Curriculum: Student Activities in American Education* 5 (1959) (hereinafter "Frederick"). In some districts, such as the Williamsport school district in this case, such activities in fact take place during the regular school day. *Bender* v. *Williamsport Area School District*, 741 F.2d 538, 543 (3d Cir. 1984).

[4] *See, e.g.*, Yarworth at 342; Gruber at 12-14; Frederick at 33-46, 52-54. *See also* D. Armstrong, K. Henson, & T. Savage, *Education: An Introduction* 406-07 (2d ed. 1985) (hereinafter "Armstrong"); A. Ornstein & D. Levine, *An Introduction to the Foundations of Education* 337-38 (3d ed. 1985) (hereinafter "Ornstein"); H. McGown, *Extracurricular Activities* 13-17 (1952) (hereinafter "McGown"); L. Otto, *Extracurricular Activities*, in *Improving Educational Standards and Productivity* (Walberg ed. 1982).

has even suggested that "perhaps the school's activity program comes more nearly [to] supplying the basic educational needs to students than does the regular academic course." [5]

Educators have consistently emphasized, however, the importance of guidance and supervision by faculty and administrators if extracurricular programs in secondary schools are to succeed.[6] This is true for several reasons. First, particularly for younger students, supervision and guidance by school staff are important to assist in organizing and implementing the activities themselves, to provide encouragement, to safeguard students' health and safety, and to maintain discipline as needed. In addition, evidence has shown that one of the important benefits to students of extracurricular activities is the opportunity to interact with teachers and administrators out of the classroom in a less structured setting, which helps adolescents learn to relate better with adults and aids student-teacher relationships in the classroom.[7] While teachers assume a more advisory and less dominant role in extracurricular activities than in the classroom, their

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[5] G. Graham, *Student Activities: An Overview and a Rationale*, National Association of Secondary School Principals Bulletin 3 (Oct., 1964) (hereinafter "Graham") (quoting A. Unruh, *Some Criteria for Evaluating a Program of Activities*, 21 School Activities 3 (Sept. 19[illegible])).

[6] *See, e.g.*, McGown at 4, 10, 21; Frederick at 8, 219-38; Armstrong at 401; E. Boyer, *High School: A Report on Secondary Education in America* 210 (1983). *Accord Bender*, 741 F.2d at 544 & n.10 (testimony of Williamsport High School principal that student club advisors, who are usually faculty members, generally participate in student group meetings and are to "be there as somebody who's going to help the students"). A recent national AASA survey found that over 91% of the responding school districts require supervision of extracurricular activities by school staff. AASA, *Equal Access: Interpretation and Implementation Guidelines* 16 (1984) (hereinafter "AASA Report").

[7] *See* Ornstein at 338; Graham at 2; Frederick at 8, 52.

function remains both time-consuming and important, as demonstrated by the fact that school districts generally provide extra compensation to teachers for such efforts.[8] As one educator has written, "[t]o be a true student activity any enterprise must be sponsored by a member or members of the professional staff." [9]

These educational principles have important implications for the decision of this Court in this case. Both because of the age and impressionability of the students involved and because of the integral part played by extracurricular activities in the secondary school educational program, the "open forum"-type analysis applied on the college campus in *Widmar* v. *Vincent*, *supra*, is inappropriate here. Instead, this Court should consider the devastating constitutional and educational consequences of granting the petitioners' request that school districts be forced to include religious activities within the established secondary school extracurricular program. In this context, AASA submits, it is clear that the decision below should be affirmed.

II. Mandating the Inclusion of Religious Activities in Public Secondary School Extracurricular Programs Would Violate the Establishment Clause of the First Amendment

Precisely because of the integral role of extracurricular activities in secondary schools, and because of the age and impressionability of the students enrolled, the threat posed by religious activity to the Establishment Clause is much greater than in the university setting. Mandating the inclusion of religious activities in secondary school extracurricular programs would violate the Establishment Clause because it would have the effect of ad-

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[8] *See* Educational Research Service, *Extra Pay for Extra Duties of Teachers 1982-83* (1983); Armstrong at 412-14.

[9] *See* Frederick at 8. *Accord* McGown at 21.

vancing religion and fostering excessive government entanglement with religion.

A. Required Inclusion of Religious Activities Would Have the Primary Effect of Advancing Religion

One of the well-established criteria for determining the constitutionality of a government practice under the Establishment Clause is whether it would have the "primary effect" of advancing or inhibiting religion. *Lemon*, 403 U.S. at 612-13. As Justice O'Connor has recently explained, this test asks whether, "irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval" of religion. *Lynch* v. *Donnelly*, 104 S.Ct. 1355, 1368 (1984) (O'Connor, J., concurring).

In *Widmar* v. *Vincent*, *supra*, this Court concluded that a policy of permitting religious groups to use an open forum established on a university campus would confer only "incidental" benefits upon religion and would not violate the Establishment Clause. *Widmar*, 454 U.S. at 274. An important reason for the Court's ruling was the fact that the university was doing no more than holding open a forum for student groups, and the university explicitly disavowed any sponsorship or approval of such organizations; thus, permitting religious groups to meet would confer no "imprimatur of state approval." *Id.* In addition, the Court specifically noted that university students are "young adults" who are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274 n.14.[10]

In this case, however, the reasons that led to the Court's decision in *Widmar* should lead to precisely the opposite result. Unlike universities, secondary schools view extracurricular activities as an important part of the educa-

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[10] *Accord Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983); *Tilton* v. *Richardson*, 403 U.S. 672, 685-86 (1971).

tional program, and provide sponsorship and guidance for such activities. The activities take place in school classrooms or other facilities, with a faculty advisor who is usually paid for his or her efforts, under school supervision, and shortly before or after classes begin. In the Williamsport school district involved in this case, in fact, the activities occur during scheduled periods within the school day itself, when school attendance is required by law. *See Bender*, 741 F.2d at 553. Requiring the inclusion of religious groups within extracurricular programs would send a strong message of state endorsement of student participation in such activities as part of the school program, in violation of the Establishment Clause.

Petitioners suggest that this problem can be ameliorated through such measures as avoiding use of school bulletin boards or limiting the role of school staff to monitoring and maintaining discipline, and that the school's attitude towards religion could remain neutral. This suggestion is fallacious. Initially, it is extremely questionable whether school faculty and administrators trained and accustomed to helping students in extracurricular activities could achieve the state of robotic noninvolvement apparently contemplated by petitioners. As one teacher placed in such a situation recently explained:

> [I]t is very difficult when people are praying not to pray along and get involved. For the record, I sit and listen. But let's just say that teachers, by nature, like to talk.[11]

In addition, even if individual school officials could somehow be neutral, the government itself would still be sending a strong signal of approval of religious activities. This is because the government would be specifically re-

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[11] New York Times, March 23, 1985, at 26. As discussed in Section II.B *infra*, the monitoring of faculty monitors themselves, which would be required to enforce a rule that faculty not participate in religious activities, would cause excessive government entanglement with religion, in violation of the Establishment Clause.

quiring inclusion of religious activities as part of a school program in schools which would prefer not to do so.[12] Regardless of whether teachers try to be neutral, the government clearly would not. This government "message of endorsement" would violate the Establishment Clause. *Lynch*, 104 S.Ct. at 1368.

Finally, even if it could somehow be said that the government was not functioning jointly with religion through such activities, this Court has recognized that the "mere appearance" of joint exercise "provides a significant symbolic benefit to religion" which may violate the Establishment Clause. *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982). In this case, even if bulletin boards were not used and faculty members were monitors only, the appearance to impressionable adolescents would clearly be one of support and approval for religious activities.[13] This is particularly so because the school would continue to play its traditional supervisory role with respect to other extracurricular activities and student conduct in general. *See Bender*, 741 F.2d at 554-55. While students could theoretically reach the alternative conclusion that the government was simply tolerating religion, the possibility of such an alternative "does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain." *McCollum*, 333 U.S. at 227. This Court has repeatedly recognized the impressionability and vulnerability to peer and adult

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[12] Several instances of such required inclusion of religious activities have already occurred pursuant to the Equal Access Act, leading to serious community problems in a number of school districts. *See* pp. 14-16, *infra*.

[13] As one school superintendent has recently written, such religious activities "would soon be perceived as an integral part of the school's extracurricular and cocurricular programs" and "it would become apparent to all students in the school that religious activity had been authorized and sanctioned." I. Singer, "Equal Access Means Promoting Religion," Education Week, May 28, 1984, at 19 (hereinafter "Singer").

influence of public school students by invalidating other "voluntary" practices which had the effect of advancing religion.[14] In this case, the Court should reach the same result.

B. Required Inclusion of Religious Activities Would Engender Excessive Government Entanglement With Religion

This Court has consistently held that a law or governmental practice violates the Establishment Clause if it fosters an "excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13; *see also Estate of Thornton* v. *Caldor, Inc.*, No. 83-1158, slip op. at 5-7 (U.S. June 26, 1985); *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970). Specifically, excessive entanglement exists where "continuing state surveillance will inevitably be required" to ensure that First Amendment rights and restrictions are respected, or where an "intimate and continuing relationship" between government and religious officials or institutions is created. *Lemon*, 403 U.S. at 619, 621-22.

Mandating inclusion of religious activities in public school extracurricular programs necessarily would foster excessive entanglement. Such activities would occur during the school day, in classrooms or other school facilities, within the context of a school-wide extracurricular program, and under the supervision of a paid school mon-

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[14] *See, e.g., Stone* v. *Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments on classroom wall); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) (Bible reading in classroom); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (classroom prayers); *McCollum* v. *Board of Education, supra* (religious instruction in schools). *Accord Wallace* v. *Jaffree*, 53 U.S.L.W. 4665, 4671 n.51 (U.S., June 4, 1985). Although it has been suggested that this Court should automatically defer to purported congressional findings in connection with the Equal Access Act concerning the impressionability of high school students, this Court has firmly held that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843-44 (1978).

itor.[15] The close relationship between the public schools and religious groups which would result would violate the Establishment Clause, as the Court of Appeals found in this case. *See Bender*, 741 F.2d at 556.

Even more importantly, it is clear that precisely the type of "continuing state surveillance" prohibited by the Establishment Clause would be required if the decision below were reversed. As the Second Circuit suggested in *Brandon, supra*, "surveillance [of religious group meetings] will be required to guarantee that participation in the prayer meetings would always remain voluntary." 635 F.2d at 979.[16] Teachers who monitor religious ac-

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[15] While petitioners have claimed that the use of a school monitor could be dispensed with altogether, this casual suggestion ignores the fact that school officials are legally and educationally responsible for maintaining "safety, order, and a secular schedule." *Bender*, 741 F.2d at 557. *Accord Brandon* v. *Board of Education*, 635 F.2d 971, 979 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). Educators writing about extracurricular activities have similarly emphasized the importance of supervision by school officials for such reasons. *See, e.g.*, Frederick at 230-32. It is AASA's experience that very few school districts permit extracurricular activities without a faculty advisor or sponsor. *See* note 6, *supra*.

[16] In fact, the recently-enacted Equal Access Act specifically provides that schools may permit meetings to occur only on a voluntary basis. *See* Equal Access Act, Pub. L. No. 98-377 (1984), Section 1(c)(1). Surveillance would similarly be necessary to enforce other provisions of the Act, such as the requirements that meetings be student-initiated, that nonschool persons not control or regularly attend such meetings, that no school sponsorship occur, and that school employees attend only in a nonparticipatory capacity. *Id.*, Section 1(c)(1), (2), (3), and (5). Controversy over these Equal Access Act provisions has already arisen in several school districts. *See, e.g.*, Newsday, April 9, 1985, at 23 (dispute concerning allegation that nonschool persons were regularly attending or controlling meetings in Hicksville, Long Island district). Although this case does not directly present the question of the constitutionality of the Equal Access Act, this Court's decision will obviously have important ramifications concerning this issue, which several lower courts are already considering. *See* note 24, *infra*.

tivities would themselves need to be monitored to ensure their "acceptance of the limitations imposed by the First Amendment." *Lemon*, 403 U.S. at 619. Such "prophylactic contacts" would involve precisely the "excessive and enduring entanglement between state and church" prohibited by the Establishment Clause. *Id.*

III. Mandating the Inclusion of Religious Activities in Public Secondary School Extracurricular Programs Would Severely Damage Extracurricular Programs and the Overall Educational Capabilities of Secondary Schools

As discussed in Section I above, extracurricular activities provide important educational benefits to students as an integral part of the school program. Serious harm to the role of such activities would in turn impair the ability of our nation's public schools to educate our children effectively. A decision by this Court requiring secondary schools to include religious activities in their extracurricular program would have precisely such a negative effect on our educational process.

Initially, as educators already have recognized with respect to the Equal Access Act, such a requirement would make it impossible for schools to prevent disruptive and potentially dangerous influences on students by outside groups. Educators have long recognized the problems of dual control and other potential "dangers of the close association of the school and special interest groups in the community" through involvement of outside groups with impressionable young students in extracurricular activities.[17] Unfortunately, as educators have recently recognized, serious dangers of improper influence on school-age youngsters are posed by cult groups and other organizations at least claiming to be religious in nature.[18]

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[17] *See* Frederick at 123.

[18] *See* Singer at 19; San Francisco Chronicle, May 1, 1984, at 1 (reporting results of university study showing that "[m]ore than

Even if nonschool persons are excluded physically from school premises in an attempt to ensure that meetings are "student-initiated," one school superintendent has recently warned that:

> [O]ne must be truly naive to assume that requests from students, already recruited by or interested in various religious cults, sects, and denominations will be "student-initiated." In fact, it is more likely that such requests will originate in religious planning offices, and students, acting as middlemen, will convey them to school authorities.[19]

In fact, disputes have already arisen under the Equal Access Act concerning the role of outside persons in controlling or participating in religious group activities.[20] Serious risks are posed concerning the undermining of school authority and undue influence on youngsters.

In addition, as discussed in Section II above, mandating the inclusion of religious groups in extracurricular programs would require monitoring, surveillance, administration, and efforts by school officials to resolve school disputes which would divert the time and attention of teachers and administrators, heighten tensions, and could seriously disrupt the school environment. For example, under the Equal Access Act, reports have occurred of "students with an evangelical mission who are attempting to win converts and to increase their club membership," placing school officials in the extremely difficult

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half the high school students in the Bay Area have been on the receiving end of recruiting drives by members of cult groups," and that the "most successful" efforts occurred on "school grounds" and other territory familiar to students).

[19] Singer at 19.

[20] *See* note 16, *supra*. Similarly, concerns have also been expressed by school officials concerning the possible role of outside persons in political groups, which are also required to have access to facilities at schools which permit other non-curricular activities under the Equal Access Act. *See* Newsday, March 17, 1985, at 6.

position of seeking to prevent undue coercion while respecting students' rights.[21] One public school was reportedly "placed in the position of determining the falsity or truth of religious beliefs" in order to determine if a sect should be "considered detrimental to the well-being of the students" and thus excluded from the school.[22] Disputes have arisen over other issues as well, such as access to school media to announce religious group meetings.[23]

In fact, in the short time since the Equal Access Act was passed last summer, it has already engendered several court battles [24] and a series of bitter disputes among teachers, parents, students, and administrators in school districts around the country.[25] In order to avoid such

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[21] *See* P. Sand, "Equal Access Act Raises Many Questions," MEA Advocate, March 27, 1985, at 24.

[22] *Id.* at 22.

[23] *See* Newsday, March 22, 1985, at 6.

[24] *See Mergens* v. *Board of Education*, No. CV85-U-426 (D. Neb. May 23, 1985) (denying preliminary injunction which would have required school to permit religious club to meet); *Amidei* v. *Spring Branch Independent School Dist.*, No. H-84-7673 (S.D. Tex. April 26, 1985) (granting injunction requiring school to permit religious club to meet); *Student Coalition for Peace* v. *Lower Merion School Dist.*, 596 F. Supp. 169 (E.D. Pa. 1984), memorandum opinion and order on motion for reconsideration (entered Feb. 1, 1985), *appeal docketed*, No. 85-1092 (3d Cir. Feb. 15, 1985) (denying injunction which would have permitted political group to hold rally and exposition on school facilities).

[25] In addition to notes 16 and 20-23, *supra*, *see, e.g.*, Newsday, March 17, 1985, at 6 (discussing disputes in several Long Island, New York school districts which, according to one school board member, have "confused, upset and divided parents" and have pitted "friend against friend and student against student"); Lafayette Journal and Courier, April 28, 1985, at 3 (reporting dispute in Lafayette, Indiana school district which has caused "resentment and anxiety" in community).

strife, many schools and school districts are considering the unfortunate alternative of banning non-curricular related extracurricular groups altogether in order to remove themselves from coverage under the Equal Access Act. One New York school district, for example, abolished a large service club which had been involved in such activities as aiding the elderly and the handicapped in order to prevent the district's schools from falling within the Act's ambit.[26] If the decision below is reversed, many other districts may well follow this example, seriously damaging extracurricular programs and the educational process.

Available evidence demonstrates, moreover, that there is no justification for the disruption and harm to the educational environment which mandatory inclusion of religious activities in extracurricular programs would cause. A 1984 AASA survey revealed that prior to the passage of the Equal Access Act, the issue of religious group access to school facilities had not arisen at all in over 70% of responding school districts, that the issue came up at the school board level in less than 2% of all districts, and that significant controversies leading to litigation had occurred in only five of the nation's 15,600 school districts.[27] Without any federal intrusion, AASA and its members have found, schools have been able to

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[26] *See* Now York Times, March 23, 1985, at 26. In fact, the Equal Access Act could well require that all school districts either abandon altogether all such extracurricular activities which are not curriculum-related or eliminate any school supervision of such activities. The Act provides that where a school permits non-curriculum-related groups to meet, it must avoid any "sponsorship" of all such meetings, which includes "promoting, leading, or participating" in a meeting. Equal Access Act, Sections 1(c)(2), 2(2). Many school districts will undoubtedly choose to eliminate non-curricular activities altogether if they cannot permit teachers to provide the guidance, leadership, and direction necessary for extracurricular activities to perform their proper function.

[27] *See* AASA Report at 14.

respond flexibly to local situations in their own communities based upon local needs, interests, and resources. Administrators report that religious groups have been able to avoid difficulties through such means as locating alternative community facilities or agreeing to use school facilities on the same basis as community groups, without any connection to school-sponsored extracurricular activities. Students who wish to discuss religious issues or to pray individually and voluntarily, of course, may do so. *Cf. Wallace v. Jaffree, supra.* Despite the dire predictions of some parties in this case, moreover, school officials had neither become excessively entangled with religion nor experienced other great difficulties in this area prior to the Equal Access Act, as the Court of Appeals recognized. *See Bender*, 741 F.2d at 556. Particularly in light of these facts, the potentially devastating consequences to public school extracurricular programs which would result from mandatory inclusion of religious activities strongly support the Court of Appeals' decision in this case.

CONCLUSION

For the reasons discussed above, *amicus curiae* American Association of School Administrators urges this Court to affirm the decision below.

Respectfully submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,

Petitioners,

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ON BEHALF OF ITSELF AND AMERICANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether school authorization for an organized student-initiated religious club meeting for worship and other religious activities in a public high school, during or at times associated with the school day, violates the first amendment's establishment clause.

2. Whether school authorization for an organized student-initiated religious club meeting for worship and other religious activities in a public high school, during or at times associated with the school day, is compelled by the first amendment's free speech clause when the club is organized during an activity period allowing meetings for other student clubs.

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STATEMENT OF THE CASE

Amici incorporate the statement of the case as set forth in the Brief for the Respondents.

Brief Amici Curiae of the Anti-Defamation League of B'nai B'rith and Americans for Religious Liberty in Support of Respondents

Amici support the position of respondents and respectfully submit that the judgment of the United States Court of Appeals for the Third Circuit in the above captioned case be affirmed.*

INTEREST OF THE *AMICI CURIAE*

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the Anti-Defamation League has previously filed *amicus* briefs in such cases as *Lynch* v. *Donnelly*, 104 S.Ct. 1355 (1984); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and *Abington* v. *Schempp*, 374 U.S. 203 (1963). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The Anti-Defamation League submits the accompanying brief because we believe the instant case raises serious questions concerning government support of religion in contravention of the establishment clause of the first amendment.

Americans for Religious Liberty is a non-profit, nationwide educational organization with members representing the entire religious spectrum. Americans for Religious Liberty is dedicated to defending religious liberty for all persons, and maintains that the defense of religious liberty requires as strict as possible adherence to the constitutional principle of separation of church and state, and that strict religious neutrality is required of our public schools by the first amendment.

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* Petitioner and Respondent have consented to the filing of this brief and their letters of consent are filed with the Clerk of the Court.

INTRODUCTORY STATEMENT

This case presents the Court with a fundamental question under the first amendment's guarantee of freedom of religion and separation of church and state. That separation guarantee arising from the establishment clause is vital to the preservation of our religious freedom and pluralism. Government neutrality in matters of religion ensures that all religions keep an equal relationship with government, and are able to confront each other as equals, without competitive discord. *See Lemon* v. *Kurtzman*, 403 U.S. 602, 622-623.

At issue is whether this separation principle is violated by provisions for so-called "equal access"[1] -- to public school facilities for student-initiated religious clubs organized at times associated with the school day.

Amici submit that it is. For when clubs are organized for worship and other religious activities in our public schools, this form of religious expression, notwithstanding its private or voluntary origins, implies state support, approval, or endorsement. When permitted to meet and engage in religious activities on public school grounds in the context of the school day, subject to school supervision and apparent school sponsorship, religious worship clubs constitute government-sponsored speech. Such government-sponsored religious speech is not entitled to the protections accorded to individual or nongovernmental group religious speech because of the establishment clause mandate. The state may not promote or endorse religion, even where such promotional endorsement is non-preferential, *see, e.g., McCollum* v. *Bd. of Educ.*, 333 U.S. 203 (1948) (striking multi-denominational

1. "Equal access" is the term used by this Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), to describe such a student-initiated religious club organized on public university premises. The latest such policy was enacted by the Congress in the Equal Access Act, 20 U.S.C. §§ 4071 (enacted August 11, 1984). It provides in relevant part:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access . . . to . . . any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical or other contents of the speech at such meeting.

religious instruction in public schools), and even when the promotion or endorsement is consented to by the individuals involved. *See, e.g., Abington* v. *Schempp,* 374 U.S. 203, 229.

Activities which take place in the public schools involve the implication or presumption of state sponsorship. This sponsorship is inferred from the nature of the public schools, which were created by the state to serve for a "public function" -- to educate our young citizenry. *See Abington,* 374 U.S. at 242 (Brennan, J., concurring). To implement this goal elaborate government machinery has been put into place: the government gathers together the students, it requires their attendance, it takes responsibility for them while they are on school premises, and it is the duty of government employees to effectuate the government's educational purpose by setting and meeting curricular governmental standards.

This government control and involvement in the public schools presents questions of government endorsement or sponsorship of religion when religious activities are organized in the schools. The elements of state endorsement impermissible under the establishment clause are the government's action in approving the activities of a religious club, and the effect of the use of school grounds during the school day, of organizing the clubs during compulsory attendance hours and the use of state employees to monitor the clubs.

Contrary to "equal access" theory, the implication of state endorsement is not vitiated by the students' initiation of the religious activities. *See, e.g.,* Brief for Petitioners at 11. This Court has repeatedly held voluntariness does not validate a practice otherwise impermissible on establishment grounds. *See Abington,* 374 U.S. at 225. Moreover, the origins of a religious activity do not necessarily determine the presence or absence of state sponsorship of that activity. *See, e.g., McCollum,* 333 U.S. 203.

Further the implication of state endorsement is not vitiated by the "equal treatment" of religious and secular activities. *See, e.g.,* Brief for the United States at 16. Equal treatment in a public forum does not raise establishment problems because in such a forum there is a low level of government involvement or endorsement. *E.g., Cantwell* v. *Connecticut,* 310 U.S. 269 (1940). In

contrast, in a public school where government involvement is pervasive, such equal treatment does not overcome the establishment clause problem.

Thus "equal access" collides with the implication of state endorsement of religious activities in the public schools. The theory of equal treatment for all activities -- religious and nonreligious alike -- is facially appealing. Yet, the first amendment's special protection of freedom of religion singles out religion and only religion for insulation from governmental action. *See Engel*, 370 U.S. at 432. Nowhere is this principle more important, and nowhere has it been more severely tested than in our public schools. *See, e.g., McCollum*, 333 U.S. 203.

The Court should here affirm the separation principle and preserve the "public function" of our public schools. To be sure, limiting the use of schools for organized religious activity treats religion differently from other activities. Yet it does not affect other alternative sites for religious expression and it guarantees that the public schools will not be used in ways that diminish rather than enhance an individual student's religious freedom. It maintains the neutrality of government in matters of religion. *See Wallace* v. *Jaffree*, 53 U.S.L.W. 4665, 4671 (June 4, 1985).

I.

THE ESTABLISHMENT CLAUSE MANDATE INSULATING RELIGION FROM GOVERNMENT IS VIOLATED BY ORGANIZING RELIGIOUS CLUBS ON SCHOOL PREMISES AT TIMES ASSOCIATED WITH THE SCHOOL DAY

A. The Establishment Clause Mandate In This Case

The application of the establishment clause mandate to the public schools was recently reaffirmed by this Court, in *Wallace* v. *Jaffree*, 53 U.S.L.W. 4665, 4668-4670 (June 4, 1985). It protects "an individual's freedom to choose his own creed." *Id.* at 4669. That individual religious freedom is jeopardized where the "gain(ing) . . . of adherents" for one religion or another is facilitated by the state through the use of the public schools. *See Abington*, 374 U.S. at 228 (Douglas, J., concurring).

That the issue is the use of the public schools for religious activities is conceded by petitioners. Under the facts of this case, 741 F.2d at 542, where equal access has been litigated, *see, e.g., Widmar,* 454 U.S. at 269, and as is contemplated by the Equal Access Act, *see* sections 802 (a), (d)(1), (2), equal access is sought for group prayer and other religious activities. Group prayer is clearly a religious activity. *See Engel,* 370 U.S. at 424 (1962); *Karen B.* v. *Treen,* 653 F.2d 897, 901 (5th Cir. 1981), *aff'd.*, 455 U.S. 913 (1982). To the extent that Bible reading and religious discussions are also involved, outside of the context of objective curricular presentations, these activities too are religious. *See Stone* v. *Graham,* 449 U.S. 39 (1980), *citing approvingly to Abington,* 374 U.S. at 225. The religious nature of these activities -- at times associated with the school day, under teacher supervision, in public schools paid for by state and federal funds -- violates the first amendment's establishment mandate. *See, e.g., Wallace* v. *Jaffree,* 53 U.S.L.W. 4665.

That mandate prohibits government promotion of religious activities because such promotion threatens individual religious freedom. *Id.* at 4669. Individual religious freedom is compromised when public school students who are compelled by law to go to school are confronted with organized worship, on school premises, during the school day and under school supervision. While the choice of joining the worshippers may be characterized as "voluntary," *see* Brief for Petitioners at 38, the confrontation with the worship service is not. Accordingly, the student is put in the position of deciding whether to join in religious activity, often organized by a group that seeks adherents, *see infra* at 8-10, and is drawing on the benefits of the implied state approval arising from the public school setting. Indeed, one of the primary reasons evangelical and other religious groups seek to have these activities in the public schools is the impression of state sponsorship which accompanies the choice of such a site.

B. Equal Access Religious Clubs Violate the Lemon Test

In its consideration of religious activities in the public schools, this Court has consistently applied the tripartite test set forth in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612 (1971). *See, e.g., Jaffree,*

53 U.S.L.W. 4665. Pursuant to this test, equal access would not offend establishment clause scrutiny only if it could pass the three-pronged analysis: First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, [the policy] must not foster an excessive government entanglement with religion." *See Widmar*, 454 U.S. at 271, *citing approvingly to Lemon*, 403 U.S. at 612-613.

Amici submit that equal access contravenes all three prongs of this test. As conceded by petitioners, its purpose is religious. While the school board herein rejected implementation of the club, were the club to be allowed today, both its subsequent sanction by the school board and its purpose as imputed through today's application of the Equal Access Act would be religious. Second, the effect of allowing religious clubs in the schools is to advance and endorse those religious activities which are organized therein. As held by the Third Circuit, allowing the use of public schools for organized religious activities extends to religious clubs the aid and endorsement of the school. This aid and endorsement advance the purpose of these religious clubs. In so doing, they also threaten the beliefs of non-participating students who, in being compelled to go to school, must resist religious coercion. 741 F.2d at 560.

Last, equal access requires excessive government entanglement in violation of the third prong of *Lemon*, 403 U.S. at 612. The Court of Appeals so held. 741 F.2d at 555-556. Equal access religious clubs place a great burden of continuous monitoring on school personnel adequately to supervise the club meetings and activities so as to minimize "the message of endorsement" of religion conveyed by school sponsorship. *Jaffree*, 53 U.S.L.W. at 4674 (O'Connor, J., concurring).

1. *The Religious Purpose of Equal Access*

a. *The Williamsport School Board's Denial*

The *Lemon* purpose inquiry, as this Court stated in *Wallace* v. *Jaffree*, looks to whether the government's actual purpose was to endorse or disapprove of religion. 53 U.S.L.W. at 4670.

As concerns equal access policies, in *Widmar* v. *Vincent*, this Court held the central factors in the inquiry concerning the purpose of equal access policies are the role of the educational institution with regard to the timing of the adoption of the equal access policy and its intended use as expressed in the text of the policy. *Widmar*, 454 U.S. at 271. Applying these factors to the instant case, the Third Circuit held that given the preexisting secular nature of the policy in Williamsport, and the school board's denial of the student worship request, that there was no evidence of religious purpose. 741 F.2d at 551. To the extent the Third Circuit's analysis was grounded on the school board's denial, it is clear that had the school board elected to allow the club, under this Court's test set forth in *Widmar* that action would have been considered evidence of religious purpose. *See, e.g., Lubbock* v. *Lubbock*, 669 F.2d 1038, 1043 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); *Collins* v. *Chandler*, 644 F.2d at 762 (9th Cir. 1981).

b. *Bender In the Context of the Equal Access Campaign – Congressional Religious Purpose in Enacting the Equal Access Act To Overrule Case Law Holding Equal Access to be Unconstitutional*

As the Third Circuit decided this case, the United States Congress enacted the Equal Access Act.[2] This Act has a direct bearing on the instant case, reflecting the purpose and effect of equal access policies. The Act's intent is to overrule those cases disallowing equal access, including *Brandon* v. *Bd. of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) and *Lubbock* v. *Lubbock*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 454 U.S. 1123 (1981).[3] *See* 130 Cong. Rec. S.8334, 8336

2. 20 U.S.C. § 4071 (passed in the House of Representatives on July 25, 1984, one day before Third Circuit delivered its decision; signed into law on August 11, 1984). Its passage culminated a campaign in the courts and Congress seeking to use the public schools for religious activities.

3. Contrary to the Briefs for the U.S. at 16, and for the Petitioners at 24-25, n.23, which erroneously rely on *dicta* in two cases, both *Bell* v. *Little Axe*, No. CIV-81-620-T (W.D. Okla. Mar. 14, 1983), *and Nartowicz* v. *Clayton County School District*, 736 F.2d 646, 649 (11th Cir. 1984) held the equal access policies before them to be unconstitutional. Just as this brief went to press, the 10th Cir. became the fifth

(daily ed. June 27, 1984). Insofar as the Act would allow those prayer club activities organized on school grounds at issue in the instant case, *see infra* note 18, *see also* Brief for the United States at 2 n.2., *amici* submit this Court should hold it unconstitutional.

This Court has consistently construed the first amendment's mandate of separation to mean that government may not legislate concerning religion. *See Jaffree*, 53 U.S.L.W. at 4670. "[T]he Establishment clause . . . withdrew all legislative power respecting religious belief or the expression thereof." *Abington*, 374 U.S. at 222. The Equal Access Act is patently religious in purpose, pursuant to the factors set forth in *Widmar*: the timing of its adoption, *i.e.*, its legislative history, and its text. *See* 454 U.S. at 271. *See also Jaffree*, 53 U.S.L.W. at 4670.

For two years prefatory to adoption of the final Act, the United States Congress considered numerous equal access proposals seeking to protect religious group prayer meetings in the public schools. The two year legislative history of the Act shows that its purpose was to extend to the public high schools this Court's decision in *Widmar*, allowing worship clubs in certain public universities with open forums.[4] *See, e.g.*, 130 Cong. Rec. S.8331, 8334-8336 (June 27, 1984) (remarks of Sens. Hatch, Denton).

U.S. Court of Appeals to hold equal access unconstitutional by affirming *Bell*.

4. Proponents of equal access legislation made clear their intentions to extend the scope of *Widmar* to the high schools. In Congressional equal access hearings, Sen. Hatfield stated: "The bill is a straightforward measure to apply the Supreme Court's decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), to public high schools which receive federal aid." *Equal Access: A First Amendment Question: Hearings on S.815 and S.1059 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) (prepared statement of Sen. Hatfield) [hereinafter *Sen. Jud. Comm. Equal Access Hearings*].

Some of the Senators involved in equal access had already been involved in the court cases. Senator Hatfield and twenty-three other members of the Senate had filed an *amici curiae* brief with this Court in the *Lubbock* case asking the Court to grant review and extend the authority of *Widmar* to the high school level. When the Court denied *cert.* in *Lubbock*, 669 F.2d 1038, 1048 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983), these Senators turned to the legislative route.

While deleting the special reference to religion found in predecessor bills,[5] the final Act retains this single religious purpose. *See Stone* v. *Graham*, 449 U.S. 39, 41.

Beyond the Act's legislative history, its text indicates religious purpose. While the final Act extended its protection of clubs from those which were solely religious, as provided for in the Religious Speech Protection Act, to all clubs, the deletion of the operative earlier language barring discrimination on the basis of the religious content of the speech and substituting protection from discrimination on the basis of "religious, political, philosophical or other contents," § 802(a), fails to mask the religious purpose of the Act. Many provisions of the statute are devoted to protecting religious activities from establishment challenge by seeking to limit the extent of government sponsorship of those activities.[6] Further, there are sections which specifically contemplate organized prayer indicating that the purpose of the Act is statutorily to authorize organized prayer meetings in the public high schools nationwide.[7]

c. *The Equal Access Campaign -- A Sectarian Religious Purpose*

In addition to the general legislative religious purpose underlying the Equal Access Act, equal access has a sectarian religious

5. *See Religious Speech Protection Act: Hearing on H.R. 4996 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Committee on Education and Labor*, 98th Cong., 2d Sess. 1 (1984) [hereinafter *House Subcomm. on Elem. Sec. and Voc. Education Religious Speech Protection Act Hearings*].

6. These provisions, which are constitutionally unnecessary as to any other type of meeting, reflect the Act's true purpose of facilitating prayer activities. These provisions include requirements that the meetings be voluntary and student-initiated, § 802(c)(1), and that there be no sponsorship of the meetings by the school, the government or its agents or employees. § 802(c)(2). Outsiders may attend and participate, but may not direct, conduct, control or regularly attend the meetings. § 802(c)(5). Employees of the school may be present at religious meetings only in a non-participatory capacity. § 802(c)(3). This last provision singles out religious meetings and further reflects the Act's religious purpose.

7. The Act expressly indicates that it does not authorize government to "influence the form or content of any prayer or other religious activity," or "to require any person to participate in prayer or any religious activity." § 802 (d)(1),(2).

purpose. *See Larson* v. *Valente*, 456 U.S. 228 (1982). For equal access provides a greater benefit to some religions than others. In providing a captive audience in the schools, it facilitates the gathering of adherents for those religions seeking to evangelize or proselytize. *See Abington*, 374 U.S. at 228 (Douglas, J., concurring).[8]

The history of equal access both in its development in case law and legislation reflects that primary proponents are those religious groups which seek to use the public schools to spread their religious message. *See, e.g., Widmar*, 454 U.S. 265 n.2. In *Widmar*, the student organization asserted its "purpose as a group is to promote a knowledge and awareness of Jesus Christ on the campus. . . . In fact, it is our purpose to attract the uninvolved so that they too might assure themselves that the answers to life's ultimate questions rest with Jesus Christ." *Chess* v. *Widmar*, 480 F.Supp. 907, 911 (W.D. Mo. 1979). *See also Nartowicz* v. *Clayton County*, 736 F.2d 646 ("Youth for Christ" desires equal access); Education Week *supra* note 8.[9]

The equal access use of the public schools advances proselytizing in a number of ways. The state provides an audience through the compulsory attendance laws. *See McCollum*, 333 U.S. at 210. The public school media, *e.g.*, bulletin boards, loudspeakers, may be used to announce the clubs. *See, e.g., Lubbock*, 669 F.2d at 1039; *Bell* v. *Little Axe*, No. CIV-81-620-T.[10] In addition to these factors, often outside church leaders will use the school-gathered

8. *See Young Life Youth Ministries Activities Raise Policy Issues for Educators*, Education Week (October 28, 1983) (Major evangelical organization have set up high school ministry programs). *See also* Note, 33 *Rutgers L. Rev.* 1008, 1047 (1981). "Students who are evangelical Christians may have more difficulty expressing their religious beliefs when denied on-campus meeting places. Students meet not only for personal worship and religious study, but also as a way of motivating other students to respond to the group's message; on campus meetings may be crucial in this latter respect." *Id.*

9. *See House Subcomm. on Elem., Sec. and Voc. Education Religious Speech Protection Act Hearings*, 72 (statement of Samuel Ericcson, Director, Washington Office, Christian Legal Society). *See also id.* at 91.

10. The evangelical use of school media to announce equal access meetings was testified to by Campus Crusade for Christ. *See Senate Jud. Comm. Equal Access Hearings* 143. Post Equal Access Act, school media have also been used to announce club meetings. *See* N.Y. Times, March 23, 1985, A.26 (Hicksville High School, Long Island, N.Y.,

audience to address the students. Youth assemblies may be held, *see, e.g. Lubbock*, 669 F.2d 1038; *Bell* v. *Little Axe*, No. CIV-81-620-T, or youth ministers may roam about the school, *see* Education Week, *supra* note 8. Post Equal Access Act, evangelical youth ministers have become "integrally involved" in religious clubs. *See* N.Y. Times, Mar. 23, 1985, A.26.

The equal access campaign thus intends to use the schools for the purpose of aiding religious faiths to gather adherents. This purpose is impermissible in the public schools. *See Abington*, 374 U.S. at 228; *McCollum*, 333 U.S. at 211. Other alternative forums for proselytizing exist. *See Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

2. *Equal Access Clubs Organized in the Public Schools Have the Effect of Government Advancing and Endorsing Religion*

a. *Equal Access Clubs -- A Presumption of State Endorsement When Religious Activities are Organized in the Public Schools*

This Court has repeatedly held where religious activities are held in the state sponsored public schools that such activities must be evaluated under special scrutiny. This scrutiny wou'd disallow religious activities in the public schools which are sustained elsewhere. Accordingly, government sponsored religious displays and sectarian prayer, barred from the public schools, have been allowed in parks, state legislatures and public universities. *Compare Lynch* v. *Donnelly*, 104 S.Ct. 1355 (1984); *Marsh* v. *Chambers*, 103 S.Ct. 3330 (1983); *Widmar* v. *Vincent*, 454 U.S. 263, 274 n.14 (1981); *Saia* v. *New York*, 334 U.S. 558 (1948); *with Stone* v. *Graham*, 449 U.S. 39 (1980) (striking Ten Commandment display posted on public school wall); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (striking New York State prescribed prayer), *Abington* v. *Schempp*, 374 U.S. 203 (1963). *Accord Tilton* v. *Richardson*, 403 U.S. 672, 685-86 (1971).

This prior Court consideration of the level of government sponsorship found in the public schools would appear to afford a

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equal access meetings part of school loudspeaker morning announcements).

presumption in this case constituting "the judicial interpretation of social facts" of the public schools. *See Jaffree*, 53 U.S.L.W. at 4675, *citing Lynch*, 104 S.Ct. 1355, 1369 (O'Connor, J., concurring).

b. *Equal Access Clubs Draw Upon The State Benefit and Imprimatur*

1) *Equal Access Theory -- The Irrelevance to Establishment Analysis of the Origins of Religious Activity*

Equal access proponents claim limiting religious clubs to those which are student initiated defies a claim of state sponsorship under the establishment clause. *See, e.g.*, Brief for Petitioners at 11,19,20; *Bender* v. *Williamsport*, 741 F.2d at 565 (Adams, J., dissenting). To so argue is to claim that the establishment bar is "limited to precluding the State itself from conducting religious exercises." *Abington*, 374 U.S. at 229. Yet this Court has failed to distinguish between state sponsored activities which are state initiated, as in *Engel* or *Abington*, and those held at outside religious instructor or parental initiative in *McCollum*, 333 U.S. 203. *See Abington*, 374 U.S. at 224-225. It has repeatedly held voluntariness of a religious activity to be "no defense to a claim of unconstitutionality under the Establishment Clause." Id. at 225.[11]

Instead this Court has held establishment concerns to prescribe a course of complete neutrality by government toward religion, *Jaffree*, 53 U.S.L.W. at 4671. These concerns bar the state from "employ[ing] its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone." *Abington*, 374 U.S. at 229. This principle is threatened when the state authorizes the use of its schools and attendance requirements for religious clubs.

11. Whether the activity concerns voluntary student attendance at religious instruction classes geared to all faiths, *McCollum*, 333 U.S. 203 (1948), the voluntary reading of Bible verses by students, *Abington*, 374 U.S. 203 (1963), or a voluntary student-initiated prayer at the beginning of the school day, *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982), all have been found to unconstitutionally advance religion in the public schools despite the voluntary nature of the activity. Three courts of appeals considering equal access have also determined voluntariness to be irrelevant. *Lubbock*, 669 F.2d at 1046; *Brandon*, 635 F.2d at 978. *See also Bender*, 741 F.2d at 554.

2) *Equal Access Clubs in the High Schools Fail the Widmar "Effect" Test*

The two factors gauging the effect of unconstitutional government sponsorship set forth by this Court in *Widmar* are the nature and extent of the government benefit provided to the equal access religious activity and the government "imprimatur" or "endorsement" of religion. 454 U.S. at 274. *See Jaffree*, 53 U.S.L.W. at 4670; *Engel*, 370 U.S. at 429.

Applying these factors to the high school prayer club proposal herein, the Third Circuit correctly held that "such group activity, when conducted within the hours of compulsory attendance, on school premises, and under official sanction and supervision, promotes an impermissible atmosphere of religious partisanship in violation of the establishment clause." 741 F.2d at 560.

In the high school setting, the greater extent of government sponsorship and involvement presents a greater government benefit to religion and imprimatur than that present in the university.[12] *See Bender*, 741 F.2d at 552.

a) *Unconstitutional Government Benefit*

Government aid to religion when religious meetings are organized in the public schools includes a number of benefits which assist religions in the furthering of beliefs: the provision of the free use of tax paid classrooms, heat and light, free teacher or government authority monitoring, and the use of state compulsory attendance laws to provide both a government forum and a government gathered audience.[13]

12. In *Widmar* on the other hand, the Court upheld equal access where only one factor -- the use of the classrooms -- was provided to the clubs. In *Widmar* there was no compulsory state law concerning attendance in the university. And other non-classroom costs related to student clubs were borne not by taxpayers but rather were paid for out of student fees. 454 U.S. at 265.

13. These benefits are at issue in this case. Further, most of these benefits are contemplated by the Equal Access Act. Pursuant to section 802(d)(3), public funds are authorized only for the "incidental costs of providing the space of student-initiated meetings." Funding for other items such as use of school funding, school mediums, and salaries for teacher supervision, is neither expressly authorized nor barred. It may conflict with sections of the Act generally barring school sponsorship of the meetings. §§ 802(c)(2), 803(2).

Such government benefits to religion have been consistently denied by this Court, including the use of public school buildings for sectarian purposes, *compare McCollum*, 333 U.S. 203, *with Zorach* v. *Clauson*, 343 U.S. 306 (1952), the benefit of the state gathered audience pursuant to the state compulsory attendance laws, and the free teacher monitoring, *Abington*, 374 U.S. at 223. When these benefits are provided to religious activities it is coercive to nonbelievers. It "is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." *McCollum*, 333 U.S. at 210. Government may not use its "power and prestige to support or influence the kinds of prayer the American people can say." *Engel*, 370 U.S. at 429.[14]

This government benefit threatens the liberty of religious minority students, as attested to in the Equal Access Act legislative process, whereby almost exclusively religious minority groups presented testimony opposing the Act because of fear of having their children, a state-gathered captive audience, exposed to proselytizing by students, teachers and outsiders through the benefit of the state school system machinery. *See, e.g., Sen. Jud. Comm. Equal Access Hearings* 232.[15]

b) Imprimatur

This Court has repeatedly held the establishment mandate to bar government from "a message of endorsement . . . of religion." *Jaffree*, 53 U.S.L.W. at 4671; *see Lynch* v. *Donnelly*, 104 S.Ct. at 1368 (O'Connor, J., concurring). "[O]ne of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval." *Engel*,

14. Added potential benefits which were rejected by the students in this case, *see* 741 F.2d at 556, are the use of school mediums to advertise school equal access meetings. *See, e.g., Nartowicz*, 736 F.2d at 649-650 (bulletin boards, loudspeakers); *Lubbock*, 669 F.2d 1038 (loudspeaker); *Bell* v. *Little Axe*, No. CIV-81-620-T, slip op. at 16 (bulletin boards).

15. That this fear is not hypothetical is evidenced by the pre-existing use of the schools for this purpose, through youth ministry programs now legalized by the Equal Access Act. *See* Education Week *supra* note 8.

370 U.S. at 429. *See also Mueller* v. *Allen*, 103 S.Ct. 3062 (1983).

This Court in *Widmar* and the four courts of appeals assessing the unconstitutionality of equal access policies have emphasized the importance of the imprimatur inquiry. *See Widmar*, 454 U.S. at 274; *Bender*, 741 F.2d at 551-557; *Nartowicz*, 736 F.2d at 649; *Lubbock*, 669 F.2d at 1045-1046; *Brandon*, 635 F.2d at 978-979.

As this Court has held in its many cases disallowing religious activities in the public schools, at issue is the presumption or implication of government sponsorship flowing from the government purpose in creating the public schools and the government machinery used to implement this purpose. Compounding the level of government endorsement present in the public schools is a subjective component of the perception of imprimatur because of the youth and impressionability of school children. Both aspects -- the "objective" and "subjective" imprimatur -- are crucial in distinguishing religious activities in the high schools from those in the university. *Compare Bender*, 741 F.2d at 552-553; *Nartowicz*, 736 F.2d at 649; *Lubbock*, 669 F.2d at 1045-46 *and Brandon*, 635 F.2d 978-979, *with Widmar*, 454 U.S. at 274 n.14.

i) Equal Access Clubs Held in Public Schools Invoke Government Endorsement.

There are numerous objective factors constituting government endorsement when equal access clubs are held in the schools: school club approval, club time during the school day in association with compulsory state attendance, teacher supervision of the clubs, and use of school mediums.

aa) School Approval.

Where equal access religious clubs are organized pursuant to a school policy recognizing extracurricular student clubs or where the school board must approve all school clubs, as was the case in Williamsport, 741 F.2d at 543 n.6, this school action constitutes government approval or imprimatur violative of establishment concerns. When such approval can be accorded to one religious non-curricular club only, as in the instant case where Petros was the only proposed religious club, 741 F.2d at 543 n.8, or as is

permissible pursuant to the Equal Access Act,[16] the effect of unconstitutionality would be even greater, as this Court held in *Widmar*, 454 U.S. at 271-272. Such approval would give the one sectarian religious club the stamp of goverment imprimatur already deemed violative of establishment by this Court. *See Engel*, 370 U.S. at 429.

bb) Timing Associated With the School Day

The timing of the equal access clubs contiguous with the school day, as this Court held in *Wallace* v. *Jaffree*, is a central factor creating school approval of the clubs. 53 U.S.L.W. at 4671, *citing McCollum*, 333 U.S. at 227. *See, e.g., Bender*, 741 F.2d at 552; *Lubbock*, 669 F.2d at 1046; *Brandon*, 635 F.2d at 979. Close association of religious activities with the school day implies recognition of the activities by the school. As this Court held in *Abington*, 374 U.S. at 288, "The exercises are held in the school buildings and perforce are conducted . . . under the authority of the local school authorities and during school sessions." The timing is deemed to coincide with the government-sponsored school day, whether the club occurs during or after the school day.[17]

Another equally important factor contributing to government sanction is the use of the compulsory attendance laws. As held by this Court in *Juffree, Abington* and *Engel*, attendance requirements create the appearance of a state-sponsored captive audience for religious activities and undermine any notion of volunteerism. Government endorsement has "special force in the public-school context where attendance is mandatory. . . . 'That a child is offered an alternative may reduce the constraint, it does

16. § 802(b) provides a limited forum exists when there is one noncurricular club; accordingly one religious club would be enough to trigger the protection of the Act.

17. *Compare Bender*, 741 F.2d at 553 (clubs meet during the student activity period during the school day), *with Brandon*, 635 F.2d at 979 (official school day begins when "buses discharge students . . . any voluntary student prayer meetings conducted after the arrival of the school buses and before the formal 'home room' period . . . would occur during school hours"); *Bell* v. *Little Axe*, No.CIV-81-620-T, slip op. at 15 (clubs meet in the morning "during the school day although prior to the commencement of classes") *and Lubbock*, 669 F.2d at 1045 (clubs meet before buses arrive and after the buses run deemed to occur "at a time closely associated with the beginning or end of the school day").

not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain.' " *Jaffree*, 53 U.S.L.W. at 4671, *citing McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring).

In this regard, the *Bender* court distinguished the public high school from the university in *Widmar*:

> Unlike universities, attendance for most high school students is made compulsory by state law. Moreover, high school instruction is given in a structured and controlled environment and in more confined facilities than is usual in the open, free and more fluid environment of a college campus.

741 F.2d at 552. Thus, high school students are more likely than college students to infer government endorsement of religion.

The facts in the instant case occur within the compulsory attendance period, twelve minutes into the first period (homeroom) of the day. 741 F.2d at 543. Other equal access policies such as those struck by the Courts of Appeals for the Eleventh, Fifth and Second Circuits, were deemed to occur sufficiently contiguous to compulsory school hours to be considered a part of the school day. *See Nartowicz*, 736 F.2d at 648; *Lubbock*, 669 F.2d at 1046-1047; *Brandon*, 635 F.2d at 978-979. *See also Bell* v. *Little Axe*, No. CIV-81-620-T, slip op. at 25; *supra* note 17.

The only relevant distinction concerning timing for purposes of the establishment question is whether the religious activities occur on school premises when the school is not functioning as a school and as a forum open to the public under state law. *E.g.*, Okla. stat. tit. 70, § 5-130 (1981). At that time the compulsory education machinery would not be in operation, and there would be no teachers or students on the school premises necessarily.[18]

18. Pursuant to the Equal Access Act, the timing of the clubs is somewhat unclear. They are to meet on school premises during "non-instructional time." § 802(b). This is defined by the Act to mean "time set aside by the school before actual classroom instruction begins or after classroom instruction ends." § 803(4). Under the majority view, this would allow clubs just before and after the school day as considered to be associated with the compulsory attendance laws struck in *Nartowicz*, 736 F.2d at 648; *Lubbock*, 669 F.2d at 1046-47; *Brandon*, 635 F.2d at 978-979; *Little Axe*, No. CIV-81-620-T, slip op. at 25 (holding unconstitutional before class prayers and considering them to

See Country Hills Christian Church v. *Unified School District*, 560 F.Supp. 1207 (D. Kan. 1983); *Resnick* v. *East Brunswick Township Board of Education*, 77 N.J. Super. 88, 389 A.2d 944 (1978).

cc) Teacher Supervision

Together with the government approval inherent in the use of the school day and in the compulsory attendance laws is the use of teacher supervision for monitoring of the clubs. While drawing the line at teacher participation dissallowed in the school religion cases, equal access contemplates "exercises . . . held in the school buildings under the supervision . . . of teachers employed in those schools," stricken in *Abington*, 374 U.S. at 225.[19] Accordingly, three appellate decisions have considered the issue of faculty monitoring to constitute state approval of equal access activities. *Bender*, 741 F.2d at 552; *Lubbock*, 669 F.2d at 1046; *Brandon*, 635 F.2d at 978. In considering the importance of this teacher monitoring, which is required by state laws for high schools but not universities, the *Bender* court again distinguished *Widmar*:

> [I]t is readily apparent that a school teacher or somebody associated with the school necessarily must impart the impression to students that the school's authority and the school's endorsement is implicated in the relevant activity, since every monitor must be approved by the school. Even a parent undertaking the role of monitor would necessarily be perceived as a school authority. It goes without saying that no such authority figure or government

take place "during the school day"). *See* 130 Cong. Rec. S. 8353 (daily ed. June 27, 1984) (regular instructional period is what the school would have when class is first scheduled in the morning -- maybe it is 8:30, maybe it is 9 -- and it ends at 3:30" (remarks of Sen. Hatfield). Pursuant to a minority interpretation in the legislative history, *see* 130 Cong. Rec. S. 8356 (daily ed. June 27, 1984) and a position advocated by the Solicitor General in this case, *see* Brief of the United States at 2 n. 2, it would also allow clubs during the school day such as those at issue in this case.

19. The line drawn between supervision and participation is a tenuous one. *See infra* note 25 (discussing teacher entanglement); N.Y. Times, Mar. 23, 1985, A.26, col. 3 (club organized under Equal Access Act supervised by teacher declaring "I can't participate . . . But it is very difficult when people are praying not to pray along").

endorsement was part of the *Widmar* activity program . . .

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741 F.2d at 552-553.[20]

Such state approval -- impermissible as to religious clubs -- constitutes the very government endorsement of religion likely to increase adherents barred by this Court. *Abington*, 374 U.S. at 229.

dd) Youth and Impressionability of School Children.

Compounding the objective factors creating government imprimatur when high school prayer clubs are held in the schools is the youth and impressionability of the school children perceiving that government endorsement.

This Court in *Widmar* distinguished between university and younger students in their ability to discern government endorsement when religious activities are organized in the public schools. *See Widmar*, 454 U.S. at 274 n.14. "University students are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality." *Id.* This concern with the way in which students perceive government sponsorship follows the Court's consistent higher level of protection for public school students, recently reaffirmed in *Jaffree*, 53 U.S.L.W. at 4671, *citing approvingly to Abington*, 374 U.S. at 290 (Brennan, J., concurring); *see Marsh* v. *Chambers*, 103 S.Ct. 3330, 3335 (1983) (distinguishing between adults not susceptible to "religious indoctrination" and children subject to "peer pressure"); *Tilton* v. *Richardson*, 403 U.S. 672, 685-686 (1971) (distinguishing university students for their ability to recognize government assistance for a secular, rather than a religious purpose).[21]

20. Such monitoring is also contemplated under the Equal Access Act. While some provisions expressly authorize monitoring only for custodial purposes, *see* § 803(2) and it is to be "non-participatory" as to religious meetings, § 802(c)(3), other provisions of the Act extend permissible supervision to protecting the "well-being" of students and faculty, and to assuring that attendance at such meetings is "voluntary." § 802(f).

21. The youth and impressionability of high school students is minimized by the U.S. government, *see* Brief for the United States at 18.

The youth and impressionability of high school students is a central factor for all four circuits limiting *Widmar* to its facts in the public university. All held that student impressionability increases the possibility of government action being seen as one of endorsement. *See Bender*, 741 F.2d at 552-554; *Nartowicz*, 736 F.2d at 649; *Lubbock*, 669 F.2d at 1045-1046; *Brandon*, 635 F.2d at 978.[22]

Public school children cannot distinguish what in any event would be difficult to discern -- a difference between government sponsorship of some elements in the school program and not of others. The problem is not simply youth and impressionability, but rather how these factors combine with the sponsorship present in the public schools in the context of the school day.[23]

(Contradictorily, however, the government would argue that the same students could not perceive neutrality rather than hostility in a school's decision not to authorize a religious club. *See* Brief for the United States at 21.) Contrary to the government's claims, the testimony on the "Equal Access Act heard by the various Congressional committees was that of high school students such as Lisa Bender, and other groups in favor of equal access, *see, e.g., Sen. Jud. Comm. Equal Access Hearings*. No expert witnesses or psychologists testified. The "psychological studies" deferred to by the government in its brief are the basis of a student note. *See* Note, 92 *Yale L.J.* 499 507-509 (1983).

Sporadic recognition of the different level of impressionability between high schoolers and adults does emerge begrudgingly in the Congressional testimony, *e.g.*, in the context of a discussion with the author of this brief concerning the differences between government sponsored religious activities among adults as opposed to children, *see House Subcomm. on Elem., Sec., and Voc. Education Religious Speech Protection Act Hearings* 199 (statement of Rep. William F. Goodling: "Let me also say that the beauty of young people is that they are so different from adults. They're not locked into cement in any way, shape or form. They're very *flexible*, very *pliable*, very agreeable and certainly not locked in, as we adults become after a period of time.") Id. at 120 (emphasis added).

22. Under the Equal Access Act, students could be even younger than high schoolers. The Act extends to "secondary schools," § 802(a), but leaving the definition of same to state law. § 803(1). In some states such as New York, secondary school includes junior high, meaning that the Act could extend to as young as eleven-year-olds. It has already been applied to fifth graders. *E.g.*, Bair Middle School, Sunrise Cty., Fla.

23. Commentators who choose to rely only on the youth and impressionability of high school children miss the point. *See, e.g., Note, The Constitutional Dimensions of Student Initiated Religious Activities in the Public High Schools*, 92 *Yale L.J.* 499 (1983).

3) *Religious clubs in the public schools require excessive school entanglement*

This Court has held that religious activities in the schools create excessive entanglement by "putting the school in a position of governance over religious activity." *See Lemon*, 403 U.S. at 621-622. As recognized by the Third Circuit, equal access poses numerous entanglement problems. These include entanglement fostered by teacher supervision of the clubs, school regulation of resources used by the clubs, and the divisiveness resulting from the organization of sectarian religious clubs on school premises.

a) *Faculty Supervision*

When religious activities occur within the school day, impermissible school entanglement is an inevitable result of the supervision required by state laws placing responsibility for students during the day with the school. Such entanglement has been held to be fatal to equal access prayer meetings held on school premises. *Bender*, 741 F.2d at 556-557; *Lubbock*, 669 F.2d at 1047; *Bell*, No. CIV-81-620-T, slip op. at 16: *Trietley* v. *Bd. of Educ.*, 65 A.D. 2d 1, 409 N.Y.S. 2d 912, 917 (1978). "If the state must engage in continuing administrative supervision of non-secular activity, church and state are excessively intertwined," *Brandon*, 635 F.2d at 979. *See also Lemon*, 403 U.S. at 620-21; *Karen B.* v. *Treen*, 635 F.2d at 902; *Collins* v. *Chandler*, 644 F.2d at 762 (holding entanglement results from school supervision of prayer at student assemblies). This government entanglement problem extends, the Third Circuit held, to supervision by non-school employees who must be approved by the school, and thus involves entanglement when accompanied by the use of school facilities. 741 F.2d 556. *See Lubbock*, 669 F.2d at 1047 n. 16, *citing to McCollum*, 333 U.S. at 208.

In addition to custodial supervision, equal access clubs require monitoring for student initiation or voluntariness. "[S]urveillance will be required to guarantee that participation at prayer meetings remains voluntary." *Lubbock*, 669 F.2d at 1047. *See Lemon*, 403 U.S. at 620-621.[24] Such supervision raises

24. Such monitoring for voluntariness is also contemplated by the Equal Access Act. *See* §§ 802 (c)(3), (f), 803(2).

a serious challenge to individual religious freedom in a school. While state law requires a measure of school responsibility over students and students should be free from proselytizing efforts during school, achieving this presents a difficult problem, as the solution of school supervision of religious activities is equally untenable. For public school teachers are not trained to monitor and lead religious discussions.[25] Moreover such state involvement may well threaten an individual student's religious freedom by testing the truth of his or her beliefs. *See U.S.* v. *Ballard*, 322 U.S. 78 (1944).

b) *School Media*

In addition to teacher supervision, the organizing of equal access on school facilities triggers the need for school regulation of school resources, so as to avoid sponsorship of religious activities.[26] This problem was conceded by petitioners in this case, who offered to voluntarily forego use of school bulletin boards or public address systems. 741 F.2d at 556. This offer reflects that petitioners themselves understand that religious clubs may not be treated "equally" with other secular clubs. This special treatment the Third Circuit believed posed troublesome entanglement, requiring the school to constantly supervise Petros. *Id.*

c) *Divisiveness*

Sectarian equal access clubs organized in the public schools produce divisiveness in violation of entanglement concerns, by dividing students according to religion and belief at a time and

25. *See House Subcom. on Elem., Sec. and Voc. Education Religious Speech Protection Act Hearings* 42 (statement of Linda Tarr-Whelan, Dir. of Gov'tl Rel., National Education Association); *Sen. Jud. Comm. Equal Access Hearings* 201 (statement of Ms. Piccinini, Pres. Maryland Teachers Assoc., speaking on behalf of National Education Association).

26. *See, e.g., Nartowicz*, 736 F.2d at 650 (bulletin boards, school address system, signs); *Bell*, No. CIV-81-620 T, slip op. at 16 (school funding, bulletin boards); *Johnson* v. *Huntington Beach*, 68 Cal. App. 3d 1, 14; 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977) (funding, supervision of membership lists to avoid discrimination); *Cf. Healy* v. *James*, 408 U.S. 39 (1972) (funding provided for student meetings in university forum).

place where the the state has required the students to be. *See Lemon*, 403 U.S. at 624.[27]

Numerous courts have held divisiveness to result from equal access meetings. *Bell*, No. CIV-81-620-T, slip op. at 16; *Johnson*, 68 C.A. 3d 1,14; *Trietley*, 409 N.Y.S. 2d at 912. Such divisiveness results even where equal access gives rise to the best possible scenario -- numerous religious clubs instead of a single coercive one. For religious divisions in the public schools go to the heart of establishment principles which prohibit government aid to religions precisely to maintain peace between sects. "[G]overnment aid will destroy that moderation and harmony which the forebearance of our laws to intermeddle with Religion has produced among its several sects)." J. Madison, *A Memorial and Remonstrance Against Religious Assessments*, ¶ 11 (1984), *reprinted at*, W. Hutchinson, R. Rutland, W. Rachal, *Papers of James Madison* 295-306 (1962). *See Mueller*, 103 S. Ct. at 3069; *Lemon*, 404 U.S. at 624.

This Court has recognized that nowhere is this more important than in our public schools. "In no activity of this state is it more vital to keep out divisive forces, than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring). *See Abington*, 374 U.S. at 242 (Brennan, J., concurring). As declared in *McCollum*, 333 U.S. 203, considering the constitutionality of multi-denominational sectarian religious instruction on public school premises, the students "will thus have inculcated in them a feeling of separation when [the public] school should be the training ground for habits of community..." *Id.* at 227 (Frankfurter, J., concurring).

27. While this concern appears to have recently been limited by the Court to cases involving direct financial support by government to religious institutions, *see Lynch*, 104 S. Ct. at 1364-1365, and *Mueller*, 103 S. Ct. 3062, 3071 n. 11 (1983), it has yet to be limited in the context of the public schools, which raise special divisiveness concerns. *See McCollum*, 333 U.S. at 227.

II.

THE ESTABLISHMENT PROBLEM POSED BY ORGANIZED GROUP RELIGIOUS ACTIVITIES IN THE PUBLIC SCHOOLS IS NEITHER MITIGATED BY EQUALITY OF ACCESS NOR OVERRIDDEN BY FREE SPEECH CONCERNS WHICH ARE MINIMIZED BY THE NATURE OF THE PUBLIC SCHOOL FORUM AND THE EXISTENCE OF ALTERNATIVES FOR RELIGIOUS EXPRESSION.

A. The Equality Mandate Inherent to Public Forums is Inapplicable to the Public School Given its Level of Government Sponsorship and Control.

1. *The Establishment Clause Mandates Special, Not Merely Equal, Treatment of Religion.*

Proponents of equal access maintain that all that is being sought is "equal treatment" for non-religious and religious activities alike. *See* Brief for United States at 16. Any government benefit is mitigated, equal access proponents argue, by the extension of that benefit to a broad group of secular activities. *See* Brief for Petitioners at 23-26.

While facially appealing, this "equality" argument is specious. It fails because it collides with our historic commitment set forth in the first amendment to treat religion specially. *See Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943). As Madison declared and was affirmed by this Court in *Engel*, it is because religion is "too personal, too sacred, too holy." 370 U.S. at 432.

While this view of religious freedom is challenged by the Solicitor General in this case, with the claim that "equality of access" was the only objective of the framers, *see* Brief for the United States at 15, the history and evolution of the first amendment are flatly contradictory. *See Jaffree*, 53 U.S.L.W. at 4669. The equality argument also fails because it is grounded on public forum doctrine inapplicable to the public school situation herein.

2. *Equal Treatment of Religion and non-Religion Prevails in Public Forums Where the Low Level of Government Sponsorship Does Not Mandate Special Treatment as is Required in the Public Schools.*

The first amendment establishment mandate requiring that there not be government-endorsed religious speech is not in conflict with free speech principles in this case. For the equality principles upon which petitioners rely emanate from public forums which fail to present establishment problems, because of a low level of government sponsorship therein. Accordingly, in public parks and streets, equal treatment of religion and non-religion is mandated, with no attendant establishment problem. *See, e.g., Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Saia* v. *New York*, 337 U.S. 558 (1948); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

In these forums, religious expression rights including a right to proselytize are free and unfettered. *See, e.g., Cantwell*, 310 U.S. 296. Similar religious expression rights were recognized by this Court in a public university, where a pre-existing broad spectrum of expression reflected its designation by the university as an open forum. *See Widmar*, 454 U.S. at 268, 274. In *Widmar*, this Court found the benefit to the religion club was "incidental" and that no imprimatur was conferred by an open forum. Just as in the traditional public forum cases, there was no balancing of equal versus special treatment of religion, because the Court found no unconstitutional level of government sponsorship mandating such special treatment.

At issue for this Court is whether the public school may be likened to the public park and university. The metaphor, *amici* argue, is inapposite. As this Court has noted, all pieces of government property are not created equal. Government may preserve property under its ownership for a lawful purpose other than expression. *U.S. Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 129 (1981); *Greer* v. *Spock*, 424 U.S. 828[28] (1976). *See Perry* v. *Perry*, 103 S. Ct. 948, 958

28. A similar analysis was followed by the Second Circuit in *McCreary* v. *Stone* concerning the right of access by citizens seeking to place an unattended nativity scene display in a small traffic circle park. *See* 739 F.2d 716 (2d Cir. 1984), *aff'd in split decision*, 53 U.S.L.W.

(1983). In *Widmar*, the university was characterized as "a marketplace of ideas," 454 U.S. 263, 267 n. 5, *citing to Healy* v. *James*, 408 U.S. 169, 180 (1972). The university had no limit to its open forum policy which included all clubs, 454 U.S. at 274. Coincident with this purpose of free speech and association, in *Widmar* there were no state laws requiring compulsory attendance or mandatory teacher supervision.

In contrast, the public school's preeminent purpose has been distinguished as that of education, rather than of public forum expression. *See Bd. of Educ. of Island Trees* v. *Pico*, 457 U.S. 853 869-70 9 (1982); *Ambach* v. *Norwich*, 441 U.S. 68, 76-77 (1979) (purpose of public high school is not marketplace of ideas but rather "preparation of individuals for participation as citizens"); *Ellis* v. *Dixon*, 349 U.S. 458 (1955). *See also McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring) ("The public school is . . . the most pervasive means for promoting a common destiny").

Furtherance of this government educational purpose in the public schools requires extensive certain government involvement -- with both establishment and free speech implications.

As concerns establishment, the constant presence of school appointed monitors carries with it the impression of official approval and endorsement, particularly when the state compulsory educational system encourages attendance at meetings of such groups. *See Bender*, 741 F.2d at 555. *See also Zorach*, 343 U.S. 306, 308-9 (1951). Religious activities organized in the " 'captive audience' setting of a school pose unconstitutional government approval." *Brandon*, 635 F.2d at 978.

But the same government involvement also challenges the claim to a public forum or free speech mandate posited in the school. The school is involved in limiting the forum so as to pursue educational goals. In Williamsport, for example, the board of

4431 (March 27, 1985). There was no need to balance conflicting first amendment concerns because the court of appeals found that the nature of the forum and its hypothetical availability to a broad range of expression raised a public forum mandate and no contervailing establishment concern. 739 F.2d 716, 722. Notwithstanding the Second Circuit's decision, it is dubious whether mere availability as opposed to an actual preexisting array of expression is sufficient to satisfy this Court's test in *Widmar*, 454 U.S. at 274.

directors reserved the authority to limit clubs to those which "contribute to the intellectual, physical or social development of the students and as is otherwise considered legal and constitutionally proper." 741 F.2d at 544. That authority was exercised pursuant to state law limiting the use of the schools. 741 F.2d at 543, n. 6. Further, the compulsory attendance laws diminish principles of freedom of speech and association essential to public forums, which require that such expression rights be voluntary. *See Greer* v. *Spock*, 424 U.S. 828, 838 (1976); *Bender*, 741 F.2d at 552 ("within this more restricted environment, therefore, involuntary contact between nonparticipatory students and religious groups is inevitable"). *Id.* at 552. *Widmar*, 454 U.S. at 274 ("high school instruction is given in a structured and controlled environment and in more confined facilities than is normal in the open, free and more fluid environment of a college campus").

Accordingly the establishment factors present in the public school attendantly diminish the claim to any public forum mandate.

3. *Alternatives to Use of the Public Schools for Religious Expression Rights Diminish the Claim to Those Rights Herein*

There are many alternatives to the use of the public schools for organized religious expression. This Court has repeatedly held, most recently in *Jaffree*, 53 U.S.L.W. at 4670 n. 45, that the public schools are not necessary to "accommodate" the exercise of organized prayer. *Id. See also Abington*, 374 U.S. at 226. In rejecting free exercise claims to school prayer in *Abington*, this Court distinguished the public schools from other government property such as prisons, where there were no alternatives for prayer. *Id.* at 299. "The student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others." *Id.* In this respect the high school child is differently situated than the university student who may very well be on an isolated campus. *See Chess* v. *Widmar*, 635 F.2d 1310, 1320 (8th Cir. 1980).

The importance of considering alternative forms for free expression rights has been emphasized by this Court in other nonreligious expression cases. In *Perry* v. *Perry*, in considering the use of the public school forum, this Court looked toward whether there are "alternative means of communication in the community." 103 S. Ct. at 955.

Accordingly, the existence of alternatives herein is crucial in gauging the nature of the putative equal access right to public school property. As the Third Circuit held in *Bender*, echoing this Court's decision in *Abington*, foregoing the use of the public schools for organized religious clubs does not impair the ability of the religious group to engage in its activities through other means, "outside of the school premises and at times other than during school hours." 741 F.2d at 560.

At least three alternatives exist to the use of the public schools at times associated with the school day. First, if religious activities are sought during the school day, students may leave the school grounds. *See Zorach* v. *Clauson*, 343 U.S. 306 (1952) (sustaining release time).

Second, group religious activities may be conducted on school grounds outside of times associated with the school day, when the public schools are used as public forums open to the community under state law. *See, e.g., Country Hills Christian Church* v. *Unified School District*, 560 F. Supp. 1207 (D. Kan. 1983). Such use of the school premises at times which are absolutely separate from the school day may not invoke the state's imprimatur of.

> A distinction might be drawn where the school buildings are not otherwise in use, as at night or during a vacation period, when the building is, in a sense, surplus land. A religious activity conducted on the premises at such a time may not be viewed as part of the educational enterprise at all.

L. Tribe, *American Constitutional Law* 825 n. 12 (1978).[29]

Last, on school premises and during the school day, students and teachers may exercise their individual religious speech rights to pray, vocally or silently, or to read their Bibles. *See Jaffree*, 53

29. This same distinction has been drawn as concerns state action regarding equal protection concerns. *Cf. Knights of the KKK* v. *East*

U.S.L.W. at 4668 (holding first amendment protects "individual's freedom of conscience"). Exercise of these individual religious speech rights do not require action by the state schools and therefore are distinguishable from the equal access clubs at issue herein. *See, e.g., Tinker* v. *Des Moines*, 393 U.S. 503 (1969) (personal political free speech rights exercised by students and teachers in public schools). This distinction eludes petitioners, who would ground equal access club rights on personal free speech cases. *See* Brief for Petitioners at 30-33, *citing to Tinker*, 393 U.S. 503; *Russo* v. *Central School District*, 469 F.2d 623 (2d Cir. 1972) (sustaining teacher refusal to participate in flag salute), *cert. denied*, 411 U.S. 932; *James* v. *Board of Education*, 461 F.2d 566 (2d Cir.) (holding teacher arm band to be free speech), *cert. denied*, 409 U.S. 1042 (1972). Yet, this Court has distinguished personal free speech rights from those involving the state. *See Tinker*, 393 U.S. at 508.

This distinction between personal religious speech rights and those requiring state involvement for their expression, is essential as concerns the establishment question before this Court. *See* J. Swomley, draft article at 7, *to be published in The Christian Century* (1985). *See also* Note, 50 *Cinc. L.Rev.* 740, 780-783 (1981).[30] To the extent that religious speech sufficiently relies to effect its purpose on the "prestige, power and influence" of the state, *Abington*, 374 U.S. at 307 (Goldberg, J., concurring), government is implicated in the advancement of religion in violation of the establishment clause.

Baton Rouge, 578 F.2d 1122, 1128 (5th Cir. 1978) (upholding KKK use of school facilities when open to the public).

30. And, indeed, it is a distinction which petitioners impliedly accept. For in pressing the equal access club right as a personal speech right, *see* Petitioner's Brief at 30-33, petitioners make no mention of teachers' free speech rights -- a right recognized by this Court in *Tinker*, 393 U.S. at 506. Yet if petitioners would ground equal access group prayer rights on the *Tinker* "individual speech rights," it is illogical to exempt teachers from those rights. Indeed, this teacher claim to equal access is now in the courts. *Mary Mae* v. *Evansville - Vanderburgh*, No. EV 84-165-C (S.D. Ind. filed June 8, 1984).

CONCLUSION

In his concurring opinion in *Abington*, 374 U.S. at 241-242, Justice Brennan declared:

> [T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. The interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and public schools particularly, of the constitutional decree against official involvements of religion which might produce the evils the Framers meant the Establishment Clause to forestall. The public schools are supported entirely, in most communities, by public funds -- funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort -- an atmosphere in which children may assimilate a heritage common to all American groups and religions.

Id.

Given the alternatives available to the use of the state schools in group religious expression rights, they should not be so used. For to allow such use is to fundamentally change their "public function." Our experimentation with equal access has already reflected this change. The public schools are becoming divided along religious lines because of the threat equal access in the schools has posed to our religious pluralism.[31] That pluralism has

31. Pre Equal Access Act, these divisions split communities. *See, e.g., Bell* v. *Little Axe*, No. CIV-81-620-T, slip op. at 16 ("hostile boorish behavior generated by this emotional controversy very clearly establishes the divisiveness along religious lines within the community.") This is paralleled post Equal Access Act, *see, e.g., Schools struggle with new law giving access to religious clubs*, N. Y. Times, March 23, 1985, at 25, col. 1 (discussing Christian club at Hicksville High School in Hicksville, Long Island, involving outside youth minister.) The schools have even turned to litigation to avoid the strife between religious factions. *See, e.g., Commack School District* v. *Rossi*, No. CIV-85-1288 (E.D. N.Y. 1985).

grown as our society has become more religiously diverse, *see Abington*, 374 U.S. at 240 (1963) (Douglas, J. concurring),and observant. *See generally*, J. Carroll, D. Jacobson, M. Marty, *Religion in America* (1979).

For their growth our religious pluralism and freedom have relied not on government institutions such as the public schools, but instead upon insulation from government. Protection of this religious freedom and diversity is the very reason for our first amendment mandate, *see Mueller*, 103 S. Ct. at 3069. We respectfully request that it not be abridged in this case, and for all the reasons set forth above, we ask that this Court affirm the judgment below.

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IN THE

Supreme Court of the United States

October Term, 1984

MICHAEL BENDER, *et al.*,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

JOHN C. YOUNGMAN, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE LUTHERAN COUNCIL IN THE USA AND THE UNITARIAN UNIVERSALIST ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Establishment Clause requires that secondary school authorities deny permission to a student religious club, whose activities include prayer and the reading of Scripture, to hold meetings under school auspices and on school property during class hours.

STATEMENT OF INTEREST

The American Jewish Committee ("AJC"), a national organization of approximately 50,000 members, founded in 1906, is dedicated to the defense of the civil rights and civil liberties of all Americans. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in our pluralistic society.

II

The Lutheran Council in the USA ("LCUSA") is a cooperative agency of five Lutheran churches, which have an aggregate membership totalling eight million persons. LCUSA is governed by a Board of Directors chosen by the five churches and expresses certain common religious concerns on behalf of its members. One of those concerns is the relationship between church and state. LCUSA has resolved to join the present brief out of its deep concern as to the possible intrusion of religion into the public school systems of this country and the possible adverse impact on the principle of separation of church and state.

The Unitarian Universalist Association ("UUA") is a denomination consisting of over 1,000 congregations with over 176,000 members. It is the policy of the UUA to intervene on an amicus basis where

First Amendment rights are threatened. Earlier this month, UUA adopted a resolution specifically opposing "equal access" plans for religious activities in public schools.

In the view of amici, to permit a secondary school student club to hold organized religious activities, at which a school monitor is required to be present, on public school property during school hours, would violate the First Amendment's Establishment Clause. The involvement of school authorities necessarily involved in the administration of such a club would inevitably constitute the kind of official endorsement of, and excessive entanglement with, religious practice, that the Constitution forbids to governmental authorities.

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This brief is submitted with the consent of the parties. Originals of the letters reflecting such consent are being lodged with the Clerk of the Court simultaneously with the filing of this Brief.

Statement of the Case

This action arises out of a challenge by a number of Williamsport Area High School students to the Williamsport Area School District's refusal to permit a student-initiated "non-denominational" religious club, named "Petros", to meet during a regularly scheduled class period at the beginning of the school day. J.A. 13-21,46. This class period is reserved for voluntary individual and group student activities, for 30 minutes two

mornings a week. Group activities include music, ecology, student government, speech and the arts. J.A. 102-03.

The club's organizers contemplated that its activities would include prayer, readings from Scripture and "the application of God's Holy Word to [the students'] problems and sharing of personal experiences." J.A.16,46. The students agreed to forego use of the school's bulletin board, newspaper, public address system and teacher advisors in connection with the activities of their proposed club. The school district denied permission to Petros to meet solely on the grounds that to grant such permission would be in violation of applicable law. J.A. 42,48,142.

The school district requires that student activities groups obtain school

permission in order to meet during the activity period. The only qualification articulated by the school district as to the nature of group activities permitted during the activity period is that they "contribute to the intellectual, physical or social development of the students and [are] otherwise considered legal and constitutionally proper." An adult advisor (usually a member of the faculty and, in any event, subject to approval by the administration) is required by law to be present at all student club meetings. The advisors generally participate in the student group meetings to the extent necessary "to help the activities." Participation by students in a group is completely voluntary, but each student must be on school grounds and accounted for during the activity period. Alternatives to participation in a group include study in the library, work with

the school's computer facilities, review of placement materials, or simply remaining in the home room until commencement of the next class period. J.A. 64,67-68,70,83,95-96,102-04.

The opinion of the Court of Appeals is reported at 741 F.2d 538 (3d Cir. 1984). The opinion of the District Court is reported at 563 F. Supp. 697 (M.D.Pa. 1983).

Summary of Argument

While student free speech rights may be implicated by the nature of the activity period created at Williamsport Area High School, it is clear that the proposed group prayer activity would impermissibly advance religion and would create excessive entanglement between the State and religion -- thus violating two

of the three prongs of the test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971). The Court of Appeals for the Third Circuit correctly determined that group prayer activity held on public school premises, conducted as part of an organized high school activity program at which a school monitor is required to be present and taking place during the hours of compulsory school attendance, violates the First Amendment's Establishment Clause.

This Court's holding in Widmar v. Vincent, 454 U.S. 263 (1981), does not require a different result. Unlike Widmar's university setting, the case at bar involves younger students in attendance at a secondary school, many attending pursuant to compulsory attendance laws. There can be no question that there are significant and cognizable differences between the extent of super-

vision required at these two types of institutions. In contrast to the situation in Widmar, faculty supervision is required throughout the student activity periods authorized by the Williamsport Area High School. In the conflict between the Free Speech Clause and the Establishment Clause, the balance must be weighted in favor of the State's compelling interest in preventing the appearance of official promotion of, and an impermissible entanglement with, religious activities in a public secondary school.

There is available no less restrictive alternative to the denial of permission for students to hold the proposed group prayer meetings. Alternatives which might be proposed, such as allowing a disclaimer to be posted or permitting such a program to take place

on the premises after school hours, would nevertheless leave open a serious potential for ostracization and stigmatization of those students who elect not to participate in such religious activities. Moreover, the danger of faculty entanglement in decisions having religious dimensions would not be resolved by such ameliorative steps. These are the very types of dangers which led the Framers to create an Establishment Clause whose concerns are co-equal with the legitimate concerns protected by the constitutional right of free speech.

Nor does the enactment into law, in August 1984, of the Equal Access Act, permitting student religious activities in secondary schools "during noninstructional time," suggest in any way that the result should be otherwise. The "equal access" student entitlements ostensibly created by

that Act may -- or may not -- ultimately be found to be distinguishable from the rights claimed by the students herein. In any event, in the end it is this Court which must determine the constitutionality of the access to school facilities sought by the students in the instant case, where the religious activity in question would take place during school hours. If such an allowance of religious practice under official auspices in a secondary school is in violation of the Establishment Clause, that constitutional failing will not be cured because Congress enacted a statute permitting a similar practice.

ARGUMENT

THE ESTABLISHMENT CLAUSE REQUIRES THAT PUBLIC SCHOOL AUTHORITIES DENY PERMISSION TO STUDENT RELIGIOUS CLUBS TO HOLD MEETINGS UNDER SCHOOL AUSPICES.

A. Religious Expression and Secular Speech are Not Constitutionally Equivalent in All Cases Involving Public Fora.

The First Amendment to the Constitution mandates that "Congress shall make no law respecting an establishment of religion." As this Court explained in Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), this provision was intended by the Framers "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." In serving that end, the Framers instituted a governmental policy of "neutrality" with respect to religion, which requires that "[n]either a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over

another." Everson v. Board of Education, 330 U.S. 1, 15 (1947). The Court recently reiterated this established principle in Wallace v. Jaffree, ____ U.S.____, 53 U.S.L.W. 4665, 4671 (U.S. June 4, 1985), asserting that "the Government must pursue a course of complete neutrality toward religion."

To be sure, the First Amendment does not require -- or even contemplate --a regime of hostility toward religion. This was made clear by the Framers when they directly juxtaposed the Establishment Clause with the Free Exercise Clause. This theme was further explicated when the Court recognized, in Widmar v. Vincent, 454 U.S. 263, 276 (1981), that the Establishment Clause is "limited by" the Free Speech clause, so as to require that regulation of religious speech with respect to public fora on a content-

related basis be subject to "applicable constitutional standards." To say this, however, is not to suggest that the constitutional standards which are "applicable" will always be identical for religious and for non-religious speech.

Thus, in Widmar, the Court applied the well-settled rule that, in order for the state to justify a content-based exclusion of particular speech, it must show -- even with respect to religious speech -- that the challenged regulation is necessary to serve a compelling state interest and that it is narrowly drawn to serve that end. Widmar, 454 U.S. at 270 (citing Carey v. Brown, 447 U.S. 455, 461, 464-65 (1980)). Upon applying that test, the Court found that a public university had failed sufficiently to meet this exacting standard in demonstrating why religious student groups should not be

afforded the same access to university facilities as secular student groups.

In reaching that conclusion, the Court specifically acknowledged that the interest of the university in complying with its constitutional obligations under the Establishment Clause "may be characterized as compelling," but found -- in that specific case -- that the compelling interest did not necessitate the barring of religious groups from the public forum. Widmar, 454 U.S. at 271. In so saying, the Court implicitly acknowledged that the "applicable constitutional standards" are not identical for religious and non-religious speech, and that application of those standards will not always lead to

identical results.[1] Indeed, had the Court found otherwise, it would have obviated

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[1] In that respect, the Court agreed in principle, if not in result in the specific case, with that portion of Justice White's argument in dissent which asserted that religious worship qua speech must be treated differently from other varieties of protected speech if the Religion Clauses are not to "...be emptied of any independent meaning in circumstances in which religious practice took the form of speech". Widmar, 454 U.S. at 284 (White, J., dissenting). See id., 454 U.S. at 271 n.9 (Court's opinion) ("...[T]he Establishment Clause requires the State to distinguish between 'religious' speech -- speech, undertaken or approved by the State, the primary effect of which is to support an establishment of religion --and 'nonreligious' speech -- speech undertaken or approved by the State, the primary effect of which is not to support an establishment of religion. This distinction is required by the plain text of the Constitution.") This analysis is borne out by the fact that, even though the Government is free to take an ideological position on issues of public controversy so long as it does not, in so doing, improperly override individual freedoms of expression, it is peculiarly forbidden from endorsing a religious point of view. See generally Tribe, American Constitutional Law, §12-4 (1978).

the special concerns that led the Framers to deal with religious expression as a sui generis concern in the First Amendment. Where the treatment in a public forum of religious expression on the same basis as non-religious speech would, in a specific case, endanger the State's mandated "neutrality" with respect to religion, it follows that the compelling state interest in avoiding the establishment of religion may, in that case, prohibit the affording of "equal access" for religious groups in a purported public forum, even while permitting -- or even mandating -- such access in another forum. In each case the Court must analyze the particular facts against the countervailing principles involved.

Arguably, student free speech rights are implicated by the nature of the activity period created at Williamsport

High School, at least to the extent that students at Williamsport have generally been afforded a forum in which to engage in group activities which "contribute to the intellectual, physical or social development of the students."[2] However, even if the Court were to find that the activity period constitutes such a limited public forum, this does not end the inquiry. The Court, under the test enunciated in Widmar, must still determine whether, in this case, the state's compelling interest in preserving the

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2 It would appear that, to the extent a limited public forum may be said to have been created in Williamsport Area High School, the forum is not nearly so broad as that in Widmar, having been explicitly limited to activities which aid in student development. See Perry Ed. Assn. v. Perry Local Ed. Assn., 460 U.S. 37, 48 (1983) ("[E]ven if we assume that ... the school district has created a 'limited' public forum, the constitutional right of access would in any event extend only to other entities of similar character.")

principle of the separation of religion and state requires denial of permission for the religious club to meet.[3]

B. The Establishment Clause Required the School District to Deny Permission to the Student Religious Club to Meet.

The Establishment Clause was intended to protect against three primary evils: the "sponsorship, financial support, and active involvement" of the state in religious activity. Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

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[3] If the Court finds no limited public forum has been created, then the arguments herein -- which demonstrate that compelling Establishment Clause concerns required the school district's refusal of consent for Petros to meet -- constitute, a fortiori, a reasonable basis for denial of consent which is sufficient to deny access to a nonpublic forum. See Perry Ed. Assn. v. Perry Local Ed. Assn., 460 U.S. 37, 46 (1983). Of course, whatever the type of forum involved, expression may not be restricted merely because public officials oppose the speaker's point of view, id., but there has been no suggestion of such motivation in the case at bar.

Nowhere has the Court been more strictly watchful of the separation of church and state than in the case of the public elementary and secondary schools. The Court has consistently invalidated any appearance of sponsorship or entanglement with religious practice in the schools. As Justice Frankfurter stated in his concurring opinion in Illinois ex. rel. Mc. Collum v. Board of Education, 333 U.S. 203, 216 (1948).

> The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children...in an atmosphere free of pressures in a realm ... where conflicts are most easily and most bitterly engendered.

The nature of school-age children and youngsters, who are generally acknowledged to be at an age where "non-conformity is not an outstanding characteristic," was

also remarked upon by Justice Frankfurter as an important consideration. Id., 333 U.S. at 227.

Thus, in McCollum, this Court held unconstitutional a program pursuant to which religious teachers of various denominations were permitted to enter public schools during class hours and teach religious subjects to interested students. Similarly, the Court struck as unconstitutional state action authorizing brief, denominationally neutral, "voluntary" prayers to be recited at the beginning of each school day (Engel v. Vitale, 370 U.S. 421 (1962)). Most recently, a state statute providing for a one-minute period of silence at the beginning of the school day "for meditation or voluntary prayer," was struck when the Court found that the statute had been enacted for the sole purpose of

advancing religion and without any secular purpose (Wallace v. Jaffree, 53 U.S.L.W. at 4670-71). The Court has also struck as unconstitutional governmental enactments which provided for recitations from the Bible, or of the Lord's Prayer, at the beginning of each school day (School District of Abington Township v. Schempp, 374 U.S. 203 (1963)); and state legislation authorizing the posting of the Ten Commandments, purchased with private contributions, on the walls of public classrooms (Stone v. Graham, 449 U.S. 39 (1980) (per curiam)).

In contrast, the Court has upheld --asa properly neutral accommodation of religion and, therefore, constitutional --"released time" programs pursuant to which public school students are permitted to depart school premises during the school day in order to receive religious

instruction elsewhere (Zorach v. Clauson, 343 U.S. 306 (1952)); and, in dicta, has suggested that the institution of a "moment of silence" which steers clear of any indication to students that the moment ought to be utilized for prayer would be sustainable as such a reasonable accomodation, or as in service of secular purposes (Wallace v. Jaffree, 53 U.S.L.W. at 4671; similarly, id., 53 U.S.L.W. at 4673 (Powell, J., concurring)). Moreover, the restrictions necessary to protect Establishment Clause interests have not been so strictly enforced in arenas not involving the public schools. Thus, in contrast to, inter alia, Engel v. Vitale, and Stone v. Graham, this Court has upheld a municipality's inclusion of a Nativity Scene in an annual Christmas pageant (Lynch v. Donnelly, 465 U.S. _____, 104 S.Ct. 1355 (1984)), and the employment by a state

legislature of Legislative Chaplains (Marsh v. Chambers, 463 U.S. 783 (1983)).

It is this scrupulous avoidance of any hint of endorsement of religious practice in the public school, a principle reinforced by the Court's holding in Wallace v. Jaffree, that must be borne in mind in applying the Establishment Clause to the case at bar. The special role of the public schools, and the Court's special concern with the avoidance of placing improper pressures on those who are the most impressionable, makes it far from "inherently implausible" (Petitioner's Brief ("Pet. Brief") at 10) that the Constitution may very well require public high schools to do that which public universities are forbidden to do, i.e., deny to organized religious student groups "equal access" to school facilities (and the concomitant appearance

of endorsement) which is available to secular student groups.

In Lemon v. Kurtzman, 403 U.S. 602 (1971), this Court set forth the by now familiar three-prong test for identifying impermissible governmental establishment of religion, the validity of which was recently reaffirmed by a majority of the Court in Wallace v. Jaffree, 53 U.S.L.W. at 4670 (Court's opinion), 4672 (Powell, J., concurring). Each of three requirements must be met if governmental practice is to be upheld against an Establishment Clause challenge: "First the [governmental practice] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion....; finally, the [practice] must not foster 'an excessive government entanglement with religion.'" Lemon v.

Kurtzman, 403 U.S. at 612-13.

Amici do not question the secular purpose for which Williamsport Area High School instituted its extracurricular activity period. However, if the high school authorities were to permit Petitioners to hold their religious club meetings on school property, during class hours and under official auspices, this would violate the second and third prongs of the Lemon v. Kurtzman test and thereby violate the Establishment Clause. To the extent this creates a conflict between the Free Speech Clause and the Establishment Clause, the balance must be weighted in favor of the State's interest, recognized as compelling in Widmar, in preventing official promotion of, and an impermissible entanglement with, religious activities in a public secondary

school.[4]

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[4] For the school authorities to allow such a religious club to meet under school auspices would similarly run afoul of the alternate analysis proposed by Justice O'Connor. Under Justice O'Connor's analysis the courts would be obliged to determine whether a challenged governmental practice "makes adherence to religion relevant to a person's standing in the political community," thereby sending "'...a message to nonadherents that they are outsiders, not full members of the political community or an accompanying message to adherents that they are insiders, favored members of the political community.'" Wallace v. Jaffree, 53 U.S.L.W. at 4673-74 (O'Connor, J., concurring) (citing Lynch v. Donelly, 465 U.S. at ____, 104 S.Ct. at 1366). Once religious clubs are instituted under the circumstances set forth here, a danger of constitutional dimensions generally will be posed -- certainly, at least,in any community in which a significant proportion of students are active adherents of a particular faith (or of a number of faiths) -- that a student not of the faith (or faiths) institutionalized by the creation of official religious clubs will be "...left with the choice of participating, thereby compromising the nonadherent's beliefs, or withdrawing, thereby calling attention to his or her non-conformity." Id., 53 U.S.L.W. at 4674. Thus, a system of school sponsored religious clubs would be unlike a state sponsored moment of silence, in that the former potentially casts the nonadherents in the role of conspicious nonparticipants in prayer and thereby may well

(i) Principal or Primary Effect of Advancing Religion.

The provision of "equal access" to the religious clubs would have a principal or primary effect of advancing religion. Concededly, "not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." Committee for Public Education v. Nyquist, 413 U.S. 756, 771 (1973). It is also acknowledged that the Court, in Widmar, looked to the forum's availability to a broad spectrum of groups in determining that the opening of the university's forum to a religious student group would not have the primary effect of advancing religion. Widmar v. Vincent, 454 U.S. at 274-75.

(footnote continued)

"favor the child who chooses to pray... ." Id., 53 U.S.L.W. at 4675.

In so holding, however, the Court noted that "an open forum in a public university does not confer a confirmation of State approval of religious sects and practices," id., 454 U.S. at 274 (emphasis supplied), and specifically contrasted university and secondary school students: "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion." Id., 454 U.S. at 274 n.14. This factor, the lesser impressionability of older college students and, accordingly, the lesser likelihood that such students would perceive a religious group as enjoying official endorsement, was treated by the Widmar Court as an independent factor justifying the opening of the university to religious groups, wholly apart from the fact that the school's open forum was

available to a broad spectrum of groups.

Widmar falls squarely within the Court's consistent perception that "[t]he college classroom with its surrounding environs is particularly the 'marketplace of ideas.'" Healy v. James, 408 U.S. 169, 180 (1972). The open forum created by the university in Widmar included over 100 recognized student groups, ranging over a broad range of positions and interests and including Students for a Democratic Society and the Young Socialist Alliance. Consistent with the notion that the colleges are a forum in which the student is presented with, and learns to select among, widely divergent ideas and theories, the Court declined to interpret the existence of such student groups as an endorsement by the university of their views.

It is the clear import of Widmar that, where such student perception of official imprimatur is likely to result, the opening of school facilities to a religious group would have, as a primary effect, the advancement of religion. Based upon that test, the Court of Appeals herein properly held that a high school setting is more susceptible than a university to an appearance of providing official imprimatur for a religious group: "[D]ifferent considerations present a more serious question of state advancement or endorsement of religion than was present in Widmar .... [T]he special circumstances inherent in a high school create heightened dangers in the context of the Establishment Clause." 741 F. 2d at 552.

The distinction between university and high school settings was borne out, in Tilton v. Richardson, 403 U.S. 672 (1971),

in which this Court upheld grants to church-related colleges and universities for the construction of buildings and facilities exclusively for secular educational purposes, based, in part, upon the observation that:

> There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives or limitations. Furthermore, by their very nature, college and post-graduate courses tend to limit the opportunity for sectarian influence by virtue of their own internal disciplines.

Id., 403 U.S. at 686 (citing Gianelli, Religious Liberty, Nonestablishment and Doctrinal Development, pt. II, the Nonestablishment Principle, 81 Harv. L. Rev. 513, 583 (1968)). See also Lemon v. Kurtzman, 403 U.S. at 616. The general

distinction between university and secondary school students is reinforced by the fact that a substantial proportion of the students at a secondary school are subject to compulsory attendance laws. McCollum, 333 U.S. at 212.

High schools, by contrast, present a more limited, socializing function, as one would expect in the context of a younger student body still being educated as to the broader values which will ultimately form the framework within which they can approach the give-and-take of college study. As this Court has stated, an important function of high schools is "inculcating fundamental values necessary to the maintenance of a democratic political system." Board of Education v. Pico, 457 U.S. 853, 864 (1982) (Brennan, J., for the plurality). These differing roles of the high schools and colleges

make clear that an officially recognized school religious organization in a secondary school is more likely to appear to enjoy official endorsement.[5]

This analysis is reinforced by the particulars of the operation of Williamsport's student activity groups. School groups meet at a regular time

[5] Petitioners erroneously compare the case at bar to various other cases in which Federal courts are said to have held that "[h]igh school students are able to hear other students' controversial expression without misperceiving school endorsement." Pet. Brief at 29. However, just as the state is constitutionally free to express a point of view with respect to virtually every topic other than religion (see footnote 1, supra), so the Constitution mandates that significantly greater care be taken by school authorities so as not to appear in any fashion to endorse, or condemn, religious views than with respect to other subject areas. Moreover, the avoidance of any such inappropriate perception must be based upon a judgment as to the likely reaction of the least, rather than the most, mature of the student population. Cf., Wallace v. Jaffree, 53 U.S.L.W. at 4673 (Powell, J., concurring) ("If it were necessary to reach the 'effects' prong of Lemon, we would be concerned primarily with the effect on the minds and feelings of immature pupils.").

during the school day at a time when all students are already required to be in school; many students are present in school pursuant to compulsory attendance laws; school approval is required before any student group may meet during the activity period; a proposed student group may only meet if it contributes "to the intellectual, physical and social development of the students"; and each student group must have an adult advisor, approved by the school principal, who is required to attend each meeting. J.A. 64,67-68,70,83,95-96,102-04; 24 Pa. Stat. Ann. §§ 13-1326,13-1327 (1962 & supp. 1985). None of these regulations or restrictions were applicable to the university student groups discussed in Widmar, nor is the extent of faculty supervision comparable in the latter case. Given Williamsport Area High School's involvement in the activities of

its student group and the differing natures of the student bodies involved, the Court of Appeals rightly held that school permission for a student religious group to meet "would be perceived as endorsing and encouraging religious practice." 741 F.2d at 553.

Petitioners cite a panoply of academic experts in support of their thesis that secondary school students are, indeed, mature enough to understand that student religious groups are not endorsed by school authorities simply because they are permitted to hold meetings. No doubt, if secondary school students were allowed to organize such groups under school auspices, Petitioners would next argue for the ability of elementary school students to make such distinctions. Whatever line is ultimately drawn will be a source of dispute, and --as is

the nature of the law -- will include on both sides of the line students capable and incapable of discerning what does and does not constitute school endorsement. However, there are clear distinctions, supported by this Court's precedents, between university and secondary school students, in terms of the applicability of mandatory attendance laws, the differing roles of universities and secondary schools, and the substantially greater control over students in the high school environment. All of these are distinctions upon which this Court has relied in the past, and they constitute appropriate criteria in this case.

Already in McCollum, Justice Reed's early allusion, in his lone dissent, to an "equal access" argument -- by his reference to the fact that public school buildings were used for other community

activities, as well as for the challenged religious group activities, id., 333 U.S. at 239 n.2 (Reed, J., dissenting) -- was rebutted by the Court's observation that "religious eduction so conducted on school time and property is patently woven into the working scheme of the school." Id., 333 U.S. at 227 (Frankfurter, J., concurring). It is the use of school time and property for religious purposes that inexorably places this case under the rule of McCollum -- and not that of Zorach v. Clauson, in which the removal of "released time" religious instruction from school premises was deemed the paramount factor distinguishing the latter case from McCollum. The reasoning of McCollum is as applicable, indeed as compelling, today in connection with the religious prayer meetings proposed to be held in Williamsport Area High School.

(ii) Likelihood of Excessive Entanglement.

The presence of a school official during student group meetings -- deemed by the school authorities to be an essential requirement for the proper running of a secondary school -- creates a nearly unavoidable likelihood of excessive entanglement between religion and state. Unlike the university student clubs in Widmar, Williamsport Area High School is required to maintain adult supervision of the meetings of its student groups, and the adult supervisors are generally involved in the content of student group meetings. The presence of these adult supervisors at a religious student club meeting will, inevitably, involve them in the administration of that club. Such involvement will be necessary, if for nothing else, to ensure

that student participation is, in fact, voluntary, to prevent any action by the student group that would suggest it is the beneficiary of official endorsement (to the extent that the club's very formation under school auspices does not already convey that message), and to further ensure that the group is run consistently with its purported status as a "non-denominational" (which is not to say non-sectarian) club.

This last duty would be the most problematic, as disputes among students over religious practice, form of prayer or other religious issues at a religious student club meeting would draw the faculty member, who is required to be present, into a role involving "... the school's authority in reaching a determination with respect to the validity of various religious beliefs and practices."

741 F.2d at 557. Thus, while the record reflects that, in this case, the teacher functioning as monitor did no more than open the room, take attendance and, while the meeting was in progress, grade papers, the danger is great of other school officials not taking such a detached role. (There is also danger that students, aware from communal interaction of the religious beliefs and convictions of their instructors (and of other students), will come to feel ostracized and stigmatized if they elect not to participate in religious activities.)

This Court has consistently struck programs of aid for secular purposes to religious schools where administration of that aid would involve a "comprehensive, discriminating and continuing ... surveillance" to ensure that the aid was

not utilized for a forbidden purpose. Lemon v. Kurtzman, 403 U.S. at 619. In Widmar, the Court found that a rule permitting a religious university student club to meet would require less entanglement than a rule excluding such clubs. Id., 454 U.S. 272 n. 11. However, the numerous factual distinctions between Widmar and the case at bar -- not the least of which are the requisite constant presence of a faculty member at club meetings and the manifestly greater administrative control at Williamsport of student activities generally -- will give rise to just the types of continuing surveillance, to avoid violations of the First Amendment, which Lemon v. Kurtzman teaches must be prevented.

Moreover, as one leading commentator has noted, however serious the type of administrative entanglement between

religion and state avoided by the line of cases typified by Lemon v. Kurtzman, "... the form of entanglement the Supreme Court deems most subversive of first amendment values is that which involves government not only in the apparatus of religion but in its very spirit -- in its decisions on belief and ritual." Tribe, American Constitutional Law, §14-12 at 870 (1978) (emphasis in original). It is fear of this most divisive of entanglements --determination of who is right and who is wrong in fundamental matters of conscience -- that has led the Court to require of the government "... a strict neutrality toward theological questions." Abington School Dist. v. Schempp, 374 U.S. at 243 (Brennan, J., concurring). Yet, in fostering an atmosphere in which a faculty supervisor will likely be called upon to resolve disputes as to religious practice and liturgy, it is

precisely this type of entanglement (together with a problematic likelihood of administrative entanglement) toward which official recognition of religious student groups in public schools would inevitably lead.

By contrast, the excessive entanglement between religion and state which Petitioners assert will result from denial of permission for religious student groups to meet is a chimera. We are not dealing here with a borderline case in which a challenged activity is "arguably non-religious." See Tribe at §14-6. Rather the student group here is clearly involved in religious activity. Were the courts and administrative authorities deemed totally unable to make a threshold determination as to what constitutes religion and religious practice there could not be the line of cases in which certain governmental

actions have been forbidden because they would run afoul of the Establishment Clause. The capacity of appropriate authorities to make a limited determination of what is, and what is not, religious activity, for purposes of the Establishment Clause, is plainly necessary if that provision is not to be drained of all meaning.

C. No Less Restrictive Alternative is Available.

There is available no less restrictive alternative to the denial of permission for students to hold the proposed group religious meetings. As has been discussed above, the school's allowance of such an organized activity lends itself to an appearance of official endorsement and to a likelihood of impermissible entanglement. Alternatives, such

as the posting of a disclaimer or permitting the religious group program to take place on the premises after school hours, would nevertheless leave open a serious potential for ostracization and stigmatization of those students who elect not to participate in the religious activities, and of faculty entanglement with those activities.

Every appellate court before which this issue has been presented has recognized that the dangers posed by faculty involvement, once religious activity takes on the dress of a school organization, are so serious as to require denial altogether of permission to hold religious meetings under official

sponsorship.[6] See Lubbock Civil Liberties Union v. Lubbock Ind. School Dist., 669 F.2d 1038, 1044-48 (5th Cir.1982), cert. denied, 459 U.S. 1155 (1983); Brandon v. Board of Education of Guilderland, 635 F.2d 971, 978-80 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981), reh'g denied, 455 U.S. 983 (1982); Nartowicz v. Clayton Co. School Dist., 736 F.2d 646 (11th Cir. 1984) (per curiam) (upholding preliminary injunction prohibiting student religious groups from meeting on school premises after school hours under faculty supervision). See also Mergens v. Bd. of Education of the Westside Comm'y Schools, No. CV 85-0-426, slip op. at 9-12 (D.Neb. May 23, 1985) (denying request of student religious

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[6] However, this is not to say that the students might not be able to engage in student-initiated prayer, provided that such religious activity does not seek the school's endorsement as an official student group. See Part D below.

group for preliminary injunction to compel school board to allow religious club meetings); but see Amidei v. Spring Branch Independent School District, No. 14-84-7673 (S.D. Tex. April 26, 1985).

D. Denial of Permission for Student Religious Groups to Meet Does Not Constitute "Hostility Towards Religion."

In short, then, the compelling interests imposed by the Establishment Clause required, in this case and on these facts, that the school deny permission to a student religious club to meet under official auspices. It must be stressed that this result may in no way be delineated, as Petitioners have asserted, as an expression of hostility towards religion nor does this result "effectively terminate individual students' religious

freedom at school" (Pet. Brief at 48). Neither does it follow, as Petitioners' Brief argues, that "[i]f equal access is ruled unconstitutional, school officials will believe all students' individual religious expressions must be stifled." Pet. Brief at 11-12. In all of the foregoing, Petitioners misconstrue both the Court of Appeals' decision and the requirements of the Establishment Clause.

As Petitioners have themselves stated, the Establishment Clause is directed toward state-initiated, as opposed to self-initiated, religious speech. However, this Court's decisions, up to and including Wallace v. Jafree, demonstrate that there is a compelling need to avoid placing the authority of the state behind religion. This requires sensitivity to the potential for unconscious, subtle pressures which exist

in the public school -- even when, in other subject areas, schools may be permitted to function more freely as fora of discourse. It is towards this end that the Court has acted rigorously to prevent organized religious activity at the primary and secondary school level.

Nevertheless, "[n]othing in the United States Constitution as interpreted by [the Supreme] Court . . . prohibits public school students from voluntarily praying at any time before, during, or after the school day." Wallace v. Jaffree, 53 U.S.L.W. at 4673 (O'Connor, J., concurring). Quite the opposite, states may properly permit "voluntary silent prayers of students who are so inclined" provided that there is no official encouragement of such activity. Id. Similarly, this Court's decisions should not be construed so as to prevent

student-initiated religious conversation between students, or prayer, during a truly unorganized "free period" at school. See Opinion of the Attorney General of the State of Maryland No. 84-031 (December 6, 1984) (to be published at 69 Opinions of the Attorney General ____ (1984)) .[7]

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7 The close of Petitioners' brief presents a "parade of horribles", a number of incidents in which school administrators are said to have prohibited "all forms of private religious expression on school campus." Pet. Brief, at 48-49. It is noteworthy that these involve not court cases, but anecdotal reports from the Congressional Record and newspapers. To the extent that the rights of students have been unduly restricted or abused, the courts are, of course, available to vindicate those rights. However, such sporadic incidents -- not to be found, incidentally, in any portion of the record -- do not diminish the important principles and considerations which the Establishment Clause imposes. Moreover, to permit public schools officially to organize student religious groups would open the door to yet another variety of abuses and "horror stories."

Rather, the Court has simply mandated, and the Court of Appeals held accordingly here, that school authorities should not be involved in religious activities in any fashion which would suggest either endorsement or condemnation.

E. Congress' Enactment of the Equal Access Act Does Not Eliminate the Establishment Clause Concerns.

The Equal Access Act, 20 U.S.C. §§4071-4072 (1984) (the "Act"), passed by Congress the day after the decision of the Court of Appeals below, provides, in relevant part, that:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the

> basis of the religious, political, philosophical, or other content of the speech at such meetings. §4071(a).

The litigation below did not deal -- as it could not -- with the meaning, applicability or constitutionality of the Act. Thus, there is no record which would allow this Court to determine whether Williamsport Area High School has a "limited open forum" within the meaning of the Act. The Act provides that "[a] public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." §4071 (b)."Noninstructional time" is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." §4072(4). It may well be, given the

structure of Williamsport's student voluntary activity which takes place within the context of the first class period of the day, that "noninstructional time" is not involved and the activity period is thus not covered by the Act. Moreover, the legislative history of the Act strongly supports an argument that it was enacted with the purpose of making possible the meetings of religious groups in public secondary schools. See, e.g., 130 Cong. Rec.S8331-36 (daily ed. June 27, 1984). Even if the Act were otherwise constitutional, this purpose of advancing religion would, in and of itself, be sufficient to invalidate the Act. See Wallace v. Jaffree, 53 U.S.L.W. at 4673 (Powell, J., concurring). Thus, the "equal access" rights ostensibly created by the Act may -- or may not -- ultimately by found to be distinguishable from the rights claimed by the Peti-

tioners, or the Act may ultimately prove to be unconstitutional for reasons unrelated to the case at bar.

In any event, in the end, "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch 137, 177 (1803). It is this Court which must determine the constitutionality of the access to school facilities sought by the students here, regardless of whether the activity period might ultimately be found to be compelled by the Act. Congress may not legislatively make constitutional that which is forbidden under the Establishment Clause. That clause demands that religious expression not be treated identically with secular speech where to do so would erode the principle of separation of church and state. Accordingly, to the extent the Act may

compel the allowance of religious practices under official auspices in the circumstances of this case, that Act is unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, et al.,

Petitioners,

—v.—

WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, AND THE NATIONAL EDUCATION ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether a public high school that permits a student religious club to meet during school hours, with the active participation of school personnel, violates the Establishment Clause of the United States Constitution, notwithstanding that other non-religious student clubs are permitted to meet as well.

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INTEREST OF AMICI[1/]

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization of over 250,000 members dedicated to preserving and defending the principles embodied in the Bill of Rights. The ACLU of Pennsylvania is the Pennsylvania affiliate of the ACLU. The ACLU and its affiliates are committed to protecting both the individual freedom of worship and the principle of government neutrality in matters of religion embodied in the two Religion Clauses of the First Amendment. The ACLU and its affiliates have been involved either directly, or as amici, in many of the leading First Amendment Religion Clause cases in this Court and throughout the country.

[1/] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court pursuant to Supreme Court Rule 36.2.

The National Education Association ("NEA") is a nationwide employee organzation with a current membership of some 1.7 million members, the vast majority of whom are employed by public educational institutions. NEA has a strong interest in preserving religious freedom and maintaining the separation of church and state in public education.

STATEMENT OF THE CASE

Petitioner Michael Bender and a number of other students at the Williamsport Area High School brought this action challenging the school's decision denying them permission to establish a religious club. The club was to meet during regularly scheduled school hours.

The central facts[2/] necessary for the constitutional adjudication of the issues in this case are as follows:

(1) The club in question, "Petros," was unquestionably religious and admittedly established for the purposes of prayer and religious instruction.

(2) The regular schcol day began at 7:45 a.m., when all students were required to report to homeroom.

2/ The full factual record was described in detail by both of the courts below. See 741 F.2d 538, 541-44 (3d Cir. 1984), rev'g 563 F. Supp. 697, 700-701 (M.D. Pa. 1983).

(3) On Tuesdays and Thursdays, after the homeroom period, the school scheduled an "activity period," for one period (from approximately 8:00 to 8:30 a.m.). The activity period was a time for student club meetings.3/

(4) It was during this student activity period that Petros wanted to conduct its meetings. The club agreed not to use the bulletin boards, newspaper, or public address system to promote its meetings.

(5) According to school authorities, student clubs were governed by established school polices requiring that:

(a) A club is approved only if it will "contribute to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper." 741 F.2d at 543-44.

3/ A complete listing of active school clubs appears in the decision below. 74 F.2d at 543, n. 8.

(b) Each student club must have an adult advisor present in the room; the adult is usually a member of the faculty, or other school employee, but may also be a parent.

(c) Depending on the nature of the club, an adult advisor is selected with a "corresponding background." J.A. 144.

(d) Adult advisors are expected to "participate in the student group meetings or activities," and not merely to act as "monitors." J.A. 83.

(6) At least during the tenure of the present principal (serving since 1974), no proposed student club had ever been denied permission to meet.

The case was presented to the district court for decision on cross-motions for summary judgment, the parties concurring that there existed no genuine issues of material fact. Relying principally on this

Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), the district court held for the plaintiffs. 563 F. Supp. 697 (M.D. Pa. 1983).

An appeal of the district court decision was lodged by only one of the defendants, John Youngman, Jr. -- then a member of the Williamsport School Board, and respondent in this Court.[4/]

The Court of Appeals reversed the district court and concluded that under the circumstances of this case, even though other non-religious clubs were permitted to meet, to permit the in-school religious activity in question would violate the Establishment Clause. 741 F.2d 538 (3d Cir. 1984).

4/ All of the other defendants, including the Williamsport Area School District, declined to appeal and therefore did not appear as parties in the Court of Appeals and have not entered appearances in this Court.

After the Third Circuit decision, but prior to the grant of certiorari by this Court, Congress enacted the Equal Access Act, 20 U.S.C. §4071.[5/] That statute, like

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5/ Because of that intervering enactment of the Equal Access Act, this Court would be jurisprudentially well advised to vacate the writ of certiorari and remand the case to the district court for reconsideration of the school district's handling of requests such as Bender's in light of the new statute.

It is now well accepted that prudence requires a court to decide all statutory questions first, before reaching an ultimate constitutional inquiry. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, concurring in part); Lowe v. SEC, 53 U.S.L.W. 4705, 4707 (June 10, 1985).

Similarly, logic suggests that prudential considerations warrant avoiding a thorny constitutional decision when an intervening statute may resolve the issue on narrower grounds. Indeed, this Court has specifically so held in Escambia County v. McMillan, 466 U.S. ____ (1984). There the Court remanded a voting rights case that had been decided on constitutional grounds for reconsideration in light of subsequently enacted amendments to the Voting Rights Act.

Remand would be particularly advisable in a case such as this, where Congress has gone to great lengths to address a difficult practical,
(footnote continued)

this case, pertains to the use of school facilities by religious, as well as other student groups, in the context of what the statute defines as a "limited open forum." However, because it was enacted after the decisions below, the Equal Access Act is not applicable in this case.

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as well as legal issue. On remand, the school district may reconsider its position in light of the Equal Access Act and, assuming a case or controversy remains, the district court will have the opportunity to construe and apply the statutory provisions. For example, by its terms the statute applies only to student meetings occurring during "non-instructional time," 20 U.S.C. § 4071. But the meaning of that provision, and its applicability in the circumstances of this case, is not at all certain. Moreover, in the context of remand proceedings, the courts will be able to analyze the legislative history of the Equal Access Act and assess its significance in the resolution of this controversy -- a task that should not be undertaken by the Supreme Court in the first instance.

Such a remand is particularly advisable where, as here, this Court will otherwise have to resolve asserted claims under three different constitutional provisions -- the Establishment, Free Exercise and Free Speech Clauses -- all allegedly in conflict.

SUMMARY OF ARGUMENT

In an unbroken line of decisions extending over the last 25 years this Court has consistently rejected the tenacious efforts of those who would interject religion into the public school curriculum. Bender is the natural extension of that precedent: this case, too, is about religious activities in the public schools, and about the constitutionality of government acts that facilitate and endorse such in-school religious activities. In this case, as in McCollum v. Board of Education, 333 U.S. 203 (1948), those government acts include permitting the religious use of school facilities, during compulsory school hours, under the aegis of school authority.

Clearly, if the student religious club in this case were the only group that the public school permitted to meet, the courts

in this case were the only group that the public school permitted to meet, the courts would have little difficulty concluding that such school policy had, at least, the effect of advancing religion and therefore violated the Establishment Clause -- notwithstanding student assertions of free speech and free exercise rights. The central question presented by this case, then, is whether that religious effect of permitting religious practices in the public schools is reduced below constitutionally offensive levels solely because the school authorizes other non-religious student groups to meet as well. Simply stated, the issue is whether the rationale of Widmar v. Vincent, 454 U.S. 263 (1981) -- in which a university was required to make school facilities available to university students for religious purposes after school hours -- ought apply to a public school where much younger

students want to make religious use of public school facilities, with the active involvement of school personnel, during the school day. We think not.

As this Court has recognized in every case raising the issue -- extending without exception back to Engel v. Vitale, 370 U.S. 421 (1962) -- the scrupulous separation of church and state is nowhere more important, and has been nowhere more vigorously enforced, than in our nation's public schools. And the reasons this Court has applied that strict scrutiny in the public school context -- the impressionability of young children, the compulsory attendance laws that make them a captive audience, the historical impulse to inculcate majoritarian religious values in children, the strong parental interest in religious education and the role of the public schools as exemplars of our democratic ideals -- serve as well to dis-

tinguish public grade and secondary schools from the public university. Thus, it is precisely those differences that compel the conclusion that in the public schools, even when other groups are permitted to meet for non-religious purposes, student religious practices must be prohibited as a violation of the Establishment Clause.

ARGUMENT

A PUBLIC HIGH SCHOOL THAT PERMITS A STUDENT RELIGIOUS CLUB TO MEET DURING SCHOOL HOURS, WITH THE ACTIVE PARTICIPATION OF SCHOOL PERSONNEL, VIOLATES THE ESTABLISHMENT CLAUSE NOTWITHSTANDING THAT OTHER NON-RELIGIOUS STUDENT CLUBS ARE PERMITTED TO MEET AS WELL.

The precedential framework for the resolution of this case is Widmar v. Vincent, supra. The Court there adopted the following analytic syllogism:

> 1. If a school has created an open forum, then it cannot exclude religious speakers, unless there is a compelling reason to do so.[6/]

6/ This Court's decisions establish beyond question that in the absence of an open forum, the Establishment Cluase not only permits, but requires, that a school exclude religious speech. See e.g., McCollum v. Board of Education, supra, Engel v. Vitale, 370 U.S. 421 (1962), Abington School District v. Schempp, 374 U.S. 203 (1963), Stone v. Graham, 449 U.S. 39 (1980).

2.The school's need to comply with the Establishment Clause would provide such a compelling justification.

3.Therefore, if the religious speech in question would occasion an Establishment Clause violation, then that religious speech must necessarily be prohibited.

In this case, unlike Widmar, even if it is assumed that an open forum existed for student clubs,[7/] the public school student

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7/ Both courts below concluded that the school had created an open forum for student groups; that is, a limited open forum. See Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983). For purposes of this brief, amici accept that conclusion to be so.

It appears, however, that the Respondent and other amici (see e.g., Br. of Kiwanis International and Key Club International as Amici Curiae) disagree. And the record in this case -- which consists only of submissions filed in connection with cross motions for summary judgment -- does appear to be painfully short of the facts needed to answer definatively such

(footnote continued)

religious use in question would have the effect of advancing religion to a degree prohibited by the Establishment Clause. Therefore, despite that otherwise open forum, the religious use is not constitutionally permissible.

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questions as: would the school permit all student groups, including the most controversial, to meet during the activity period?, was Petros denied the opportunity to meet for any reason other than Establishment Clause concerns?, etc.

Whatever the merits of that factual dispute as to the existence of a limited open forum in this case, it is essential to note that as a legal matter the existence of an open forum is a necessary prerequisite to permitting any religious use at all. If there is no open forum -- that is, if some (or all) secular groups are not allowed to meet -- then to permit the religious use would constitute a special benefit to religion that would clearly violate the Establishment Clause under well established precedent. McCollum v. Board of Education, supra. The history, logic and specific terms of the Equal Access Act recognize this principle by providing for "equal access" only when there exists a "limited open forum." 20 U.S.C. § 4071, et seq.

A. RELIGIOUS SPEECH IS CONSTITUTIONALLY DISTINGUISHABLE FROM ALL OTHER SPEECH.

Although religious speech is certainly protected by the Free Speech Clause of the First Amendment, Widmar v. Vincent, supra, Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981), it does not follow that all religious speech is constitutionally indistinguishable from other expression. Indeed, the First Amendment itself defines a content-based distinction between religious speech and other speech: only religious speech can -- depending on the status of the speaker, or the circumstances of the speech -- become so imbued with the authority of the government that it may be prohibited by operation of the Establishment Clause.

For example, when a teacher stands up in front of the class and reads the Bible, that is religious speech; but it is

constitutionally prohibited because the teacher is acting with the authority of the state. Abington School District v. Schempp, supra. And when children go off to private religious instruction in a public school classroom, that is religious speech; but the constitution requires that it be barred because the school's involvement unconstitutionally promotes religious education. McCollum v. Board of Education, supra. And when posters reciting the Ten Commandments are printed and purchased with private money, and displayed in public school classrooms, that is religious speech; but the Establishment Clause commands nonetheless that the religious speech be removed from the wall -- even though the Declaration of Independence may well remain -- because such official government support for religion may not be countenanced. Stone v. Graham, supra.

The Petitioner's mistakenly contend, Pet. Br., at 18-21, that since they are not government employees, their speech is private and the Establishment Clause does not apply. However, this case is not about whether their speech is itself, standing alone, a violation of the Establishment Clause; but rather whether the government acts facilitating that speech -- making the school rooms available, during hours of compulsory attendance and under the guidance of a school appointed adult supervisor -- have a sufficiently significant religious purpose or effect. If so, it is those government acts that are unconstitutional. Thus, the religious speech itself in McCollum v. Board of Education was entirely private -- the students engaged in their own private religious exercises under the supervision of private religious instructors. But the government was properly

held to have violated the Establishment Clause for permitting that private religious speech in public school classrooms during school hours and with school endorsement. See also Stone v. Graham, supra.

That Establishment Clause distinction between religious and other speech -- which permits, indeed compels, a "discrimination" against religious speech when its religious purpose or effect is attributable to the government -- reflects the profound political and social wisdom of the Framers. The Establishment Clause gives voice to their understanding of the unique role of religion as, on the one hand, an abiding strength of our private lives, and yet at the same time a potentially devisive instability in our collective governmental system:

- historically, religion has proven to be a singularly powerful motivating force, and therefore religious differences engender the most intense societal conflicts;

- religious, unlike secular beliefs, rest on faith, not reason -- they are therefore, less amenable to the give-and-take compromises that are essential for the functioning of the body politic;

- conversely, the majoritarian, secular powers of government threaten to overwhelm and trivialize the religious diversity that we hold so dear as a people.

Therefore, the critical inquiry in this case, as in any Establishment Clause case, is not whether religious speech is involved -- religious speech is always involved in an Establishment Clause case;[8/] but rather whether the context of the religious speech implicates the government in such a way as to trigger the prohibitions of the Establishment Clause. In this case, amici sub-

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8/ Of course, "religious speech" is used here to include the communicative significance of religious symbols, as well as words. Cf. Tinker v. Des Moines Indep. Community School District, 393 U.S. 503 (1969).

mits that it does, because of the special attributes of the public schools and their especially close relationships to, and control over, public school students.

B. FOR A PUBLIC SCHOOL TO PERMIT THE RELIGIOUS ACTIVITIES IN THIS CASE WOULD HAVE THE EFFECT OF ADVANCING, AND CONVEYING A MESSAGE OF ENDORSEMENT OF, RELIGION.

As recently re-emphasized in Wallace v. Jaffree, ___ U.S. ___ (1985), the three-part test articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971) remains the appropriate standard for assessing an Establishment Clause claim. Of particular importance in this case is the second, "effects" test,9/

9/ There is no suggestion that the school had a religious purpose in creating the activity period or in refusing Petros permission to meet. See 741 F.2d 538, 551. However, the circumstances of this case do show impermissible "entanglement," in that by authorizing the religious club the school must necessarily become involved on a continuing basis in monitoring, supervising and participating in

(footnote continues)

which provides that a government act is unconstitutional if "its principal or primary effect [is] one that neither advances nor prohibits religion." Id., at 613.

That Establishment Clause analysis has been significantly amplified by Justice O'Connor in her concurring opinions in Lynch v. Donnelly, ____ U.S. ____ (1984), and in Wallace v. Jaffree, supra. Her formulation maintains the underlying Lemon-test inquiry, but would focus on the issue of government endorsement of religion and, particularly as to the effects test, "whether the [government act] actually conveys a message of endorsement" of religion. Id., at ___ (concurring opinion).

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its activities and censoring its public announcements. See 741 F.2d at 555-57. Since "entanglement" is alone sufficient for a finding of unconstitutionality, the Court of Appeals decision should be affirmed on this ground independent of other considerations.

Regardless of the standard applied, however, for a public school to permit religious meetings in school facilities during school hours and under the direction of school personnel will involve the government in advancing religion -- and will certainly have the effect of conveying a message of government endorsement of religion -- by (i) providing government benefits to religion, as well as (ii) seeming to affix the imprimatur of state approval on those religious activities. Therefore, because of the resulting religious effect -- that clear message of endorsement -- the school may not constitutionally allow the Petitioners' religious use.

1. The Benefit to Relgion

This Court has already analyzed the benefits that flow to religion in circumstances closely analogous to this case. McCollum v. Board of Education, supra. There, too, private religious practices were permitted in the school during school hours. In that case, students were under the immediate supervision of private clergy, but were nonetheless subject to the ultimate authority of the goverment. In Bender, the benefit to religion is even greater than in McCollum because, in addition to in-school religious practice during school hours under school authority, here the supervisor was school appointed and participated in the student activities as a matter of school policy.10/ Thus the student religious ac-

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10/ Apparently, Petros was allowed to meet once and, at that meeting, a teacher monitored, "but took no part in the meeting." Pet. Br., at
(footnote continued)

tivities in McCollum and Bender would both substantially benefit from governmental aid in two general respects: (i) they would both draw their participants from an audience compelled to be present in the school by operation of State law; and (ii) they would both receive free use of tax supported government facilities and personnel.

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4. However, despite that limited ad hoc experience, the record establishes that school policy requires the selection of supervisors having a "corresponding background" with the interests of the students, J.A. 144, and that the supervisors must actually "participate in the student group meetings or activities," rather than merely act as monitors. J.A. 83. As applied to the religious clubs, this policy means that teachers, who share the students religious beliefs, will actually participate with them in their religious practices. There is no indication in the record that students have the power to waive these requirements of school policy, notwithstanding an apparant desire to do so.

That active religious involvement of school personnel will not only provide a benefit to religion, but will bolster the sense that the school has endorsed those relgious practices with the imprimatur of its authority; see discussion infra.

Perhaps the most important benefit to religion that the Court found objectionable in McCollum was that "[t]he operation of the State's compulsory education system . . . assists and is integrated with the program of religious instruction carried on by separate religious sects." Id., at 209. The Court of Appeals below recognized that the same benefit would accrue to Petros, if it were allowed to meet. 741 F.2d at 553. And that is so even though the students at the Williamsport Area High School could choose not to attend the religious activities; so could the students in McCollum. The fact remains that a discrete captive audience -- school children in attendance in school at government compulsion -- was available for solicitation by religious adherents to participate in their religious activities. It is the access to that audience, rather than the success of the message, that constitutes the government benefit to religion.

Similarly, the McCollum Court found that the "integration of the tax-established and tax-supported public school system to aid religious groups to spread their faith," id., at 210, provided an improper benefit to religion as well. Such free use of tax supported facilities offended the long-established proposition that "[n]o tax large or small, can be levied to support any religious activities or institutions . . . whatever form they may adopt to teach or practice religion." Everson v. Board of Education, 330 U.S. 1, 16 (1947). Similar improper benefits to religion would be accorded to the Petitioners in this case if their religious practices were permitted: they would recieve the free use of facilities, including utilities, supported entirely by public tax revenues, and they would receive the benefits of school-employed supervisors for their religious activities. To provide

all of these benefits to religion implicates the government in the advancement of religion to a degree prohibited by the Establishment Clause.

Finally, for purposes of assessing the benefit to religion, the fact that other, non-religious clubs are allowed to meet is essentially irrelevant.[11/] If, for example, the religious club were alone allowed to meet with any student voluntarily desiring to join, the benefits to religion would be precisely the same as in this case. The benefits accorded the non-religious clubs are not in derogation of, but in addition to, the benefits to religion.

11/ It might more logically be argued that the existence of the other clubs lessen the imprimatur of state endorsement. However, as demonstrated infra, even that argument is without merit because it depends on an unrealistic appraisal of the nature of public high schools and their students.

2. Imprimatur of State Endorsement

The Supreme Court in Widmar v. Vincent, supra, recognized that an "imprimatur of State approval on religious sects or practices" would confer an unconstitutional governmental benefit on religion. Id., at 274. See also the decision below, 741 F.2d at 555, and Brandon v. Board of Education, 635 F.2d 971, 978 (2d Cir. 1980). Of course, in Widmar the Court concluded that such an impermissible imprimatur did not attach. There are many reasons why that conclusion ought be different in the context of the public schools.

First, as the Court itself recognized in Widmar, university students "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." Id., at 450, n. 14. The concern about "impressionability" is particularly

important in the public school setting, not only because the students lack the maturity of adults but also school officials tend to exercise a pervasive influence on the life of the child while in school. And it is that combination of a relatively immature and suggestible student body, in a highly structured school environment controlled in virtually every respect by the State, that suggests public school students may reasonably be unable to distinguish active school endorsement of religious activities from mere neutral indifference.

Second, in assessing the extent to which the school appears to be endorsing religion, one must look not only at a few of the most mature senior students[12] but the

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12/ Petitioners attempt to refute the "impressionability" claim by relying on the Congressional testimony -- taken during hearings on the Equal Access Act -- from a very small number of high school students, including

(footnote continued)

full range of the student body including the less sophisticated children as young as 13 in the lower high-school grades (and of course younger still in the grade schools), as well as those students holding minority religious beliefs. A young student, or a student of a faith without many adherents at the school is likely to see school endorsement of religion

- in the religious use of school classrooms, which these students must then attend immediately thereafter for other regular school purposes;

- in the presence and participation of school employees -- perhaps their own teacher -- in the religious activities of a religious club;

- in the very fact of school approval of the club and its religious practices.

Lisa Bender who was a senior at the time and seemingly quite mature. Pet. Br., at 34. Obviously though, Establishment Clause concerns do not focus only those handful of high school students with the sophistication to testify in Congress as to their own maturity.

Like all of our civil liberties, the protections of the Establishment Clause must be measured with special sensitivity for the perspective of the minorities -- whether they be youthful students, or adherents of minority religious views -- who are intended as principal beneficiaries of the Bill of Rights. And when viewed in that light, it becomes evident that a public school cannot permit the religious use of its facilities, in the circumstances of this case, without reasonably appearing -- to a significant segment of the general public school student body -- as endorsing the religious practices involved.

Finally, in attempting to prove that public school students are not too impressionable, the Petitioners refer to court decisions that:

> "consistently have recognized high school students' ability to hear controversial views without perceiving school endorsement, whether expressed

> by students in school newspapers, school assemblies, or student groups, by teacher in the classroom or by materials in the school curriculum." Pet. Br., at 30-31.

However, the Petitioners' argument is flawed in a number of important respects.

For one, it entirely misses the point of the Establishment Clause: the government is only prohibited from endorsing religion, or religious views. Therefore, political speech may be allowed even if some students might mistakenly attribute it to the government because, even if they were correct, the Constitution would not be violated. It is only when the government is perceived as advancing religious speech that the Establishment Clause prohibitions may be offended.

Furthermore, even if it were true that children can be exposed to controversial political speech "without perceiving school endorsement," id., it is not at all clear

the same is true of religious speech. A student usually learns from countless different sources -- from textbooks, assembly programs, school projects and directly from the teachers themselves -- that school authorities are generally committed to mainstream American political values. So that when students hear -- for example, at a school assembly -- a controversial speaker of the right or the left, there is very little chance that they will confuse those views with the school's, since they know the school's views so well. The same cannot be said of religious speech: precisely because the schools do not generally teach religion, when religious activities are interjected into the school curriculum they are especially prominent, and reasonably likely to be perceived as having the endorsement of the school.

In this case, the students at Williamsport Area High School were afforded an "activity period" for a total of two in-school periods a week. Prior to the events in this case, the clubs that were approved were all essentially innocuous -- clubs such as Peer Helpers, Future Homemakers of America, Band and the Spanish Club are not the sort to engender any principled committment of their members, nor were they likely to provoke any strong passionate reaction of the non-members.[13/] And the subject matter of all of

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13/ This case does not raise the issue of whether the school could intentionally preclude controversial political and social student activities, quite apart from the religious activities at issue here. See Tinker v. Des Moines Independent School District, 393 U.S. 505 (1969). And amici does not, therefore, address that issue.

However the uniformly non-controversial nature of the authorized clubs prior to Petros does raise a question about whether a legitimate open forum existed at the school. As explained above, see n. 6, if a true open forum for all other student clubs did not exist, then a
(footnote continued)

those clubs is entirely consistent with those mainstream educational values that the students know are, in fact, endorsed by the school.

Into that rather homogenous mix, the Petitioners want to add Petros -- a religious club. As a result, Petros will undoubtedly be seen by many as "acceptable" to the school's values, in the same way that all of the other clubs are. And that imprimatur of school approval will be enhanced by the very fact that Petros is different than the other clubs: it will receive more attention, it will be more controversial, it will undoubtedly engender the opposition of some students and teachers who feel at odds with its religious message, and the school will therefore have to establish a more

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religious student club could certainly not be permitted to meet. Widmar v. Vincent, supra; McCollum v. Board of Education.

involved presence in order to maintain the non-disruptive functioning of this one club.[14] In practical effect, the message of school endorsement will be certain and clear.

Of course, the strong personal feelings that give rise to the Petitioners' interest in religion is nothing but admirable. However, they have more than enough opportunity to give expression to those feelings outside the school setting, and the only question here is whether their in-school religious practices are constitutionally permissible.[15]

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[14] Of course, the Establishment Clause was enacted for the very purpose of preventing just such divisiveness and religious disputes in the public sector. See e.g. Engel v. Vitale, supra.

[15] The District Court below concluded that the Petitioners' asserted Free Exercise claim was entirely without merit in the context of this
(footnote continued)

In the circumstances of this case, the student religious use in question would have the government significantly benefit and advance religion, and would have the effect of signalling that the government endorsed the students' religious views and practices. Therefore, the Establishment Clause prohibits those in-school, religious meetings, and they may not be allowed notwithstanding that other, non-religious clubs are allowed to meet. Widmar v. Vincent, supra.

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case. 563 F. Supp. at 701. Those claims were not seriously pursued by Petitioners thereafter.

Petitioners have, however, attempted to articulate an "accomodation" argument. Pet. Br. at 45. This argument should be summarily rejected because the government has not burdened any of their rights that need accomodating. See, Wallace v. Jaffree, supra at ___, n. 45. Moreover, even if such a burden existed, it arises solely as a result of the government's obligation to abide by the Establishment Clause. And as Justice O'Connor recently observed in rejecting an "accomodation" argument: ". . . it is beyond the authority of the State . . . to remove burdens imposed by the Constitution itself." Id., at ___ (concurring opinion).

CONCLUSION

For all the foregoing reasons, the Third Circuit decision should be affirmed.

Dated: June, 1985

Respectfully submitted,

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NO. 84-773

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MICHAEL BENDER, et al.,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT DISTRICT, et al.

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF OF RESPONDENTS

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MOTION TO FILE SUPPLEMENTAL BRIEF

Pursuant to Rule 35.5 of the Rules of this Court, Respondents move to be allowed to file a Supplemental Brief.

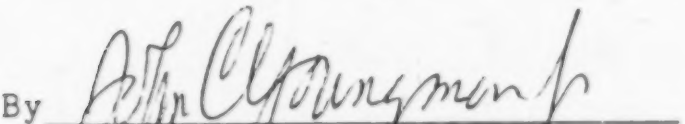
The facts set forth in said Brief were not brought to the Court's attention at oral argument. Nor do these facts appear in the Briefs filed in this case. Counsel for Petitioners intimated that the public forum question was not argued before the District Court for the Middle District of Pennsylvania in this matter. The material to be called to the Court's attention shows, from the Appendix filed in the United States Court of Appeals for the Third Circuit, that the public forum question was argued before the District Court.

Respondents believe a short Supplemental Brief responding to the Post-Argument Brief of Petitioners will be of assistance to the Court in its decision.

WHEREFORE, movants respectfully request that their Motion for Leave to file the following Post-Argument Brief be granted.

Respectfully submitted,

CANDOR, YOUNGMAN, GIBSON & GAULT

By 
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POST-ARGUMENT BRIEF OF RESPONDENTS

The Court's attention is called to the following facts:

1. The public forum question was argued before the District Court. The contrary was indicated by Petitioners' counsel at oral argument. This matter appears in the Appendix filed with the Court of Appeals Pages A303

through to the middle of Page A334, inclusive.

2. Paragraph 1 of the Complaint filed in this matter stated that each member of the School Board was sued in his individual, as well as, his official capacity (J.A. 13). Paragraph 1 of the Complaint was incorporated in all Counts of the Complaint (J.A. 17, 18, 19).

3. The District Court granted a judgment against the Defendants and not simply against the Williamsport Area School District (P. App. 105a).

4. Petitioners' bill for attorney's fees was filed against all Defendants (J.A. 146) and not just against the Williamsport Area School District.

I. STANDING TO APPEAL

Respondent was a named Defendant

in this action. A judgment was entered against him that he violated the constitutional rights of Petitioners. Respondent should have standing to appeal such a judgment in order to clear his name if for no other reason.

Respondent was and is threatened at all times in this litigation by the Complaint and by the Motion for Attorney's Fees with liability for the attorney's fees of Petitioners. Respondent has a right to defend against this threat. If Respondent's appeal on the merits is resolved in his favor, then he could not be subject to any liability for attorney's fees.

Respondent agrees with Petitioners' Post-Argument Brief with respect to his standing as a parent of a child in the high school. Inasmuch as

he was named as a party and at all times has been a party to this lawsuit, there was no need to intervene. A jurisdictional statement as to his parent capacity could have been readily supplied if his standing had been objected to at any point.

II. MOOTNESS

This case is not moot for the reasons stated in footnote 4 of the Court of Appeals' Opinion (P. App. 4a). The adding of new Plaintiffs would relate back to the beginning of the action pursuant to the provisions of F.R.C.P. 15.

In any event, if this case is moot for any reason other than the standing of Respondent to appeal originally, the rule of United States v.

Munsinzwear, Inc., 304 U.S. 36, 71 S. Ct. 104 (1950) should apply.

Respectfully submitted,

CANDOR, YOUNGMAN, GIBSON & GAULT

By _____
John C. Youngman, Jr., Esquire
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that three copies of the within Motion for Leave to file Post-Argument Brief and Post-Argument Brief of Respondents has been served on the following, by placing same in the U.S. Mail, postage prepaid, this 7th day of November, 1985.

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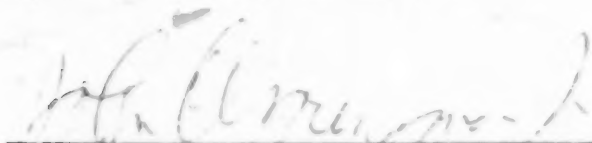

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